93-924

Supreme Court, U.S.
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Case No: _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

WILLIAM H. BRECK, Petitioner,

vs.

PACIFICA BAY VILLAGE ASSOCIATES, INC.,
and
RESOLUTION TRUST CORPORATION,
as conservator and liquidator of the Pacific Savings Bank
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE FIRST DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA

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November 30, 1993

QUESTIONS PRESENTED

Does the Decision of the California Court of Appeal for the First District offends the standards mandated by the United States Constitution:

a. by refusing de novo review and abdicating its judicial responsibility to apply its independent judgment to the interpretation of a written contract on undisputed facts, by giving "substantial deference" to the Trial Court's determination based on a "conflict in evidence", which is (1) not a conflict in fact, and (2) not material to the interpretation of the written contract before the Court;[1]

b. by basing its decision upon Petitioner's "failure to object ... for over one year", contrary to undisputed documentary evidence in the Record showing that Petitioner did "object" within a few weeks after receiving Ms. Matthew's after-the-fact proposed draft 'final settlement agreement';[2]

c. by disregarding the governing Statute Law of the State of California with reference to which Petitioner's Mortgage (Note and Deed of Trust), and the subject 'settlement agreement', were made (including specifically the 'Statute of Frauds' in CC §1624), on an undisputed factual Record showing that (1) the subject 'agreement' contains no reference to the Real Property or to the Property Owner; (2) the subject 'agreement' contains no reference to the Mortgage (Note or Deed of Trust); and (3) the subject 'agreement' contains no indication of any intent to 'pay', 'satisfy', or 'discharge' the Mortgage debt or lien;[3]

d. by disregarding the governing Statute Law of the State of California with reference to which the subject 'settlement agreement' was made (including specifically the 'Equal Dignities Rule' of CC §2309, applicable to out-of-court 'settlement agreements' by virtue of by CCP §664.6), on an undisputed factual Record showing that (1) the Property Owner did not participate in the negotiations or authorize or sign the 'agreement' by or through any authorized officer; (2) the attorneys for the Property Owner did not claim (or

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1 Court of Appeal Decision in Appendix A-1, at A-6.

2 Court of Appeal Decision in Appendix A-1, at A-9.

3 Court of Appeal Decision in Appendix A-1, at A-8.

produce evidence of) 'written authority' to enter into the out-of-court 'settlement agreement' for or on behalf of the Property Owner; and (3) no other person present had authority to contract for or on behalf of the Property Owner;[4]

e. by disregarding the governing Decision of the California Supreme Court in Mesler v. Bragg Management Co., 39 Cal3d 290, 216 CR 443, 702 P2d 601 (1985), which clearly established that a corporate client, not "expressly include[d]" as a named party to a compromise settlement of litigation, "[c]ould not magically benefit from [an] agreement" relating to a different corporate client, even when the corporate clients are related (e.g., alter ego liability), and are represented by the same attorney;[5]

f. by adopting an 'unexpected' 'new rule of law' (not based on statute or prior Court Decision, and rejected by every other Court to consider the issue) that: an attorney may include, and "bind", an 'absent-unnamed client', while appearing to negotiate a 'settlement agreement' for a different client, **if only (1)** the attorney has previously filed 'legal pleadings' in court for the 'absent-unnamed client', **and (2)** the attorney signs the agreement as "counsel for [the 'other' client's name] et. al" (emphasis added), without otherwise disclosing the 'absent-unnamed client' to the adverse party, and without the authority, knowledge, consent or participation of the 'absent-unnamed client';[6]

g. by applying the 'unexpected' 'new rule of law' to the disadvantage and destruction of valuable property interests of Petitioner (a Non-Resident of California), by declaring Petitioner's Mortgage (Note and Deed of Trust) to be deemed "satisfied" and "void", without giving Petitioner notice and opportunity to address the merits and application of the 'unexpected' 'new rule of law';[7] and

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4 Court of Appeal Decision in Appendix A-1, at A-8.

5 Ignored in Court 's Appeal Decision; see Appendix A-1, et seq.

6 Court of Appeal Decision in Appendix A-1, at A-7 to A-8.

7 Court of Appeal Decision in Appendix A-1, at A-9; Orders of Solano Couty Superior Court at A-10 thru A-14.

h. by De-Publishing its Decision, contrary to CRC 976(b),[8] and contrary to Petitioner's request to Publish the Decision[9]:

(i) to prevent 'notice', debate, discussion and criticism of the 'new rule of law' applied by the Court in this case;[10] and

(ii) to prohibit 'citation' of, and 'reliance' on, the Decision in any other case or proceeding;[11]

contrary to Petitioner's rights under:

(1) the 'contract clause' in Article I, Section 10, of the United States Constitution;

(2) the 'due process clause' of the 14th Amendment to the United States Constitution;

(3) the 'equal protection clause' of the 14th Amendment to the United States Constitution;

(4) the 'privileges and immunities clause' of the 14th Amendment to the United States Constitution ?

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8 California Rules of Court §§ 976(b) "Standards for Publication of Decisions of Other Courts".

9 Court of Appeal Decision in Appendix at A-1; Letter Requesting Publication of Court of Appeal's Decision at A-19; Order of Court of Appeal denying publication at A-47; Order of California Supreme Court denying publication at A-87.

10 California Rules of Court ('CRC') § 976(e).

11 California Rules of Court ('CRC') § 977(a).

LIST OF PARTIES

The parties affiliated with Petitioner in the Courts below were:

(1) VENTURE FUND I (an Alaska Limited Partnership); [12]

(2) WILLIAM H. BRECK, an Alaska resident (Petitioner herein), formerly the individual General Partner of Venture Fund I (above), and its successor in interest;[13]

(3) RICHARD P. SAX, a corporation (who was the Substituted Trustee of the Deed of Trust held by Venture Fund I at the time the litigation was filed); and [14]

(4) DOES 1 through 35, inclusive.[15]

The Parties affiliated with Respondent in the Courts below were:

(1) VILLAGE ON THE BAY DEVELOPMENT (a California "joint venture" between Pacifica Bay Village Associates, Inc. [Respondent herein] and JP Village Bay Partners, named below); [16]

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12 The Venture Fund I limited partnership was dissolved by its terms effective December 31, 1991, and its interests in the Mortgage (i.e. Deed of Trust and Note) on the Bay Village property were assigned to William H. Breck (Petitioner herein), as liquidator for the limited partnership, by Assignment dated December 20, 1991, and recorded in the real estate records of Solano County, California, where the Bay Village property is located. Venture Fund I participated in the Appeal to the California Court of Appeals only as a nominal party. Therefore, Venture Fund I is not named as a co-Petitioner on this Petition for Writ of Certiorari.

13 Id.

14 Richard P. Sax is a nominal party as Substituted Trustee on the Deed of Trust formerly held by Venture Fund I (now held by William H. Breck, Petitioner herein), and has no substantive interest in the outcome of this litigation Richard P. Sax did not participate in the Appeal to the California Court of Appeal except as a nominal party. Therefore Richard P. Sax is not named as co-Petitioner on this Petition for Writ of Certiorari.

15 No parties were ever named or substituted for the Does 1 through 35. Therefore such fictitious parties are not named as co-Petitioners on this Petition for Writ of Certiorari.

16 The Village on the Bay Development 'joint venture' was dissolved by agreement of the 'joint venturers' effective January 31, 1989, by the 'Notice of Dissolution of [Joint Venture] Partnership' (Record at p. 209), before the events giving rise to the issues presented on this Petition. Village on the Bay

(2) PACIFICA BAY VILLAGE ASSOCIATES, INC., a California corporation (Respondent herein), which is a wholly owned subsidiary of PSB Realty, Inc., named below;[17]

(3) PSB REALTY, INC. (a California corporation), which is a wholly owned subsidiary of Pacific Savings Bank, named below; [18]

(4) PACIFIC SAVINGS BANK (a California corporation, formerly operated as a savings and loan association), which was closed by the Resolution Trust Corporation on October 13, 1989,[19] and has been administered by Resolution Trust Corporation in its capacity as "conservator, receiver and liquidator" for Pacific Savings Bank since that time;[20]

(5) the RESOLUTION TRUST CORPORATION (an instrumentality of the United States Government), in its capacity as "conservator, receiver and liquidator" for Pacific Savings Bank;[21]

Development did not participate in the Appeal to the California Court of Appeal except as a nominal party. Therefore, Village On The Bay Development is not named as a co-Respondent on this Petition for Writ of Certiorari.

17 Pacifica Bay Village Associates, Inc. (Respondent herein) received sole title to the Bay Village property by Grant Deed dated May 30, 1989 (Record at p. 474), and expressly assumed the obligation to pay all encumbrances on the Bay Village property by the terms of the First Assumption and Modification Agreement dated April 1, 1989 (Record at p. 479), both of which documents were subsequently recorded in the real estate records of Solano County, California.

18 PSB Realty, Inc., is merely a nominal party in this litigation, due to its position as the parent corporation of Pacifica Bay Village Associates, Inc., and as the wholly owned subsidiary of Pacific Savings Bank. Therefore PSB Realty, Inc. is not named as a co-Respondent in this Petition for Writ of Certiorari.

19 This is the date Pacific Savings Bank was officially 'seized and closed' by the Resolution Trust Corporation (Record at pp. 725-727).

20 The corporate charter for Pacific Saving Bank has not been renewed by the Resolution Trust Corporation. Therefore Resolution Trust Corporation is believed to be the real party in interest, as the conservator, receiver and liquidator of the assets of the former Pacific Savings Bank. Therefore Pacific Savings Bank is not named as a co-Respondent in this Petition for Writ of Certiorari.

21 The Resolution Trust Corporation is declared to be an instrumentality of the United States Government by Section 21A (b) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ('FIRREA'), P.L. 101-73, 103 Stat. 183 at 369. Since the Resolution Trust Corporation has undertaken the complete liquidation of Pacific Savings Bank (including its subsidiaries and their property) it is believed that the Resolution Trust Corporation is now the real party in interest as the conservator, receiver and liquidator for Pacific Savings Bank.

(6) JP VILLAGE BAY PARTNERS (a California limited partnership composed of L. Lee Kauftheil and Gary L. Chase and Jonathan Group Properties, Inc., named below);[22]

(7) JONATHAN GROUP PROPERTIES, INC. (a California corporation) which is a wholly owned subsidiary of Jonathan Group, Inc., named below);[23]

(8) JONATHAN GROUP, INC. (a California corporation) which is wholly owned by L. Lee Kauftheil and Gary L. Chase, named below;[24] and

(9) L. LEE KAUFTHEIL and GARY L. CHASE, California Residents, and the owners of Jonathan Group, Inc. (above). [25]

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22 L. Lee Kauftheil testified as "attorney", "Chief Financial Officer", "Secretary" and a "Vice President" of Jonathan Group, Inc., that Jonathan Group Properties, Inc., and JP Village Bay Partners were created "for accounting purposes" as subsidiaries of Jonathan Group, Inc., to separate the Bay Village project from other projects in the accounting books and records of Jonathan Group, Inc., and served no other function. (Record at p. 733). Neither JP Village Bay Partners nor Jonathan Group Properties, Inc. held any interest in Pacifica Bay Village Associates, Inc. or Pacific Savings Bank, and any interest in the Bay Village property was terminated by the transfer and relinquishment of all interests in the Bay Village property to Pacific Bay Village Associates, Inc. (Respondent herein) by the 'Notice of Dissolution of [Joint Venture] Partnership' dated May 24, 1989 (Record at p. 470), the 'Grant Deed' transferring all interests in the Bay Village property to Pacifica Bay Village Associates, Inc. dated May 30, 1989 (Record at p. 474), and the comprehensive assumption of obligations, releases and hold-harmless agreement by Pacifica Bay Village Associates, Inc. (Respondent herein) contained in the Assumption and First Modification Agreement dated April 1, 1989 (Record at p. 479). Therefore, the Jonathan Group, Inc., and its subsidiaries (Jonathan Group Properties, Inc. and JP Village Bay Partners), are considered to have no further interest in this litigation, and are not named as co-Respondents on this Petition for Writ of Certiorari.

23 Id.

24 Id.

25 L. Lee Kauftheil was "attorney", "Secretary", "Chief Financial Officer", "Vice President", and "50% owner" of Jonathan Group, Inc. Gary L. Chase was "President" and "50% owner" of Jonathan Group, Inc. Neither Kauftheil nor Chase held any interest in Pacifica Bay Village Associates, Inc. or Pacific Savings Bank, and any interest indirectly held in the Bay Village property was terminated by the documents terminating and dissolving the former 'Joint Venture' with Pacifica Bay Village Associates, Inc. (Respondent herein) as described in footnote 19 supra. Therefore Kauftheil and Chase are considered to have no further

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OPINIONS BELOW

This Petition for Writ of Certiorari relates to the Decision of the California Court of Appeal for the First District entered on June 16, 1993,[1] which Affirmed the Solano County Superior Court's Orders dated August 4, and August 6, 1992, declaring Petitioner's Mortgage (Note and Deed of Trust) to be "satisfied" and "void".[2]

The Solano County Superior Court stated no reason for its Orders dated August 4, 1992 and August 6, 1992, or for denying Petitioner's timely filed Motion for Reconsideration on September 29, 1992, [3] beyond the cryptic text of the Orders themselves.[4]

After the 'Decision' by the California Court of Appeal for the First District on June 16, 1993, Petitioner timely Requested Publication of the Decision [5] in accordance with Rule 978 of the California Rules of Court, and timely filed a Petition for Rehearing[6] with the First District Court of Appeal. The Court of Appeal then denied Petitioner's Petition for Rehearing on June 30, 1993,[7] and also denied Petitioner's Request for Publication on June 30, 1993, and referred it to the California Supreme Court.[8]

Petitioner's timely filed Petition for Review[9] to the California Supreme Court, and Petitioner's Request for Publication (referred to

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1 Court of Appeal Decision in Appendix at A-1 thru A-9.

2 Solano County Superior Court Order dated August 4, 1992, in Appendix at A-10 thru A-11; and Order dated August 6, 1992, in Appendix at A-12 thru A-14

3 Solano County Superior Court Denying Defendant's Motion To Reconsider - dated September 29, 1992 - in Appendix at A-15 thru A-16.

4 Petitioner thereupon filed its Notice of Appeal to the California Court of Appeal for the First District. See Notice of Appeal dated September 29, 1992 in Appendix at A-17 thru A-18.

5 Letter Request for Publication under Secs. 978(a) and 967 (b) of the California Rules of Court dated June 20, 1993 in Appendix at A-19 thru A-24.

6 Petition for Rehearing to the California Court of Appeal - dated June 22, 1993 in Appendix at A-25 thru A-46.

7 Court of Appeal Order denying Petiton for Rehearing, dated June 30, 1993, in Appendix at A-49.

8 Court of Appeal Order denying Petitioner's 'request for publication' dated June 31, 1993 in Appendix at A-47; and Transmittal Letter from the Court of Appeal to the California Supreme Court dated June 29, 1993 in Appendix at A-48.

9 Petition for Review, dated July 26, 1993, in Appendix at A-50 thru A-86.

the California Supreme Court by the Court of Appeal for the First District, Division Five), were denied on September 1, 1993.[10]

JURISDICTION

Petitioner's Petition for Writ of Certiorari is filed in this Court within 90 days after the date of denial of Petitioner's Petition for Review and denial of Petitioner's Request for Publication by the California Supreme Court, in accordance with 28 USC 2101 and Rule 20 of the Rules of the Supreme Court of the United States.

Jurisdiction is vested in the United States Supreme Court by 28 USC 1257(a), to review by Certiorari the "[f]inal judgments or decrees rendered by the highest court of any State in which a decision could be had ... where any ... right, privilege, or immunity is specially set up or claimed under the Constitution ... of the United States".

Petitioner asserts that the Decision of the California Court of Appeal, First District, Division Five, together with the de-publication of such Decision, deprives Petitioner of 'due process', 'equal protection', and 'privileges and immunities' under the 14th Amendment, and the 'contract. clause' in Article I, §10, of the U.S. Constitution.

Petitioner's constitutional claims were asserted in the "Petition for Review"[11] filed by Petitioner in the California Supreme Court on July 26, 1993, which was denied by the California Supreme Court's Order filed September 1, 1993.[12]

STATUTES INVOLVED

CONSTITUTION OF THE UNITED STATES OF AMERICA

ARTICLE I, SECTION 10: "Restrictions upon powers of states. No state shall ... pass any ... law impairing the obligation of contracts, ..."

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10 California Supreme Court Order denying Petition for Review and denying Request for Publication, filed September 1, 1993, in Appendix at A-87.

11 Petition for Review dated July 26, 1993 in Appendix, A-50 at A-82 thru A-85

12 Order from the California Supreme Court denying Petition for Review, and denying Request for Publication, dated September 1, 1993, in Appendix at A-87.

AMENDMENT XIV

"§1. **Citizenship rights not to be abridged by states.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. [Proposed by Congress on June 13, 1866, and declared ratified on July 28, 1868]"

CALIFORNIA RULES OF COURT ('CRC')

CRC "**Rule 976 PUBLICATION OF APPELLATE OPINIONS**

(a) **[Supreme Court]** All opinions of the Supreme Court shall be published in the Official Reports.

(b) **[Standards for publication of opinions of other courts]** No opinion of a Court of Appeal or an appellate department of the superior court may be published in the Official Reports unless the opinion:

(1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule;

(2) resolves or creates an apparent conflict in the law;

(3) involves a legal issue of continuing public interest; or

(4) makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law.

(c) **[Publication procedure]**

(1) [*Courts of Appeal and appellate departments*] An opinion of a Court of Appeal or an appellate department of the superior court shall be published if a majority of the court rendering the opinion certifies, prior to the decision's finality in that court, that it meets one or more of the standards of subdivision (b).

(2) [*Supreme Court*] An opinion certified for publication shall not be published, and an opinion not so certified shall be published, on an order of the Supreme Court to that effect.

(d) [**Superseded opinions**] Unless otherwise ordered by the Supreme Court, no opinion superseded by a grant of review, rehearing, or other action shall be published. After granting review, after decision, or after dismissal of review and remand as improvidently granted, the Supreme Court may order the opinion of the Court of Appeal published in whole or in part.

(e) [**Editing**] Written opinions of the Supreme Court, Courts of Appeal, and appellate departments of the superior courts shall be filed with the clerks of the respective courts. Two copies of each opinion of a Court of Appeal or of an appellate department of a superior court which the court has certified as meeting the standard for publication specified in subdivision (b) shall be furnished by the clerk to the Reporter of Decisions. The Reporter of Decisions shall edit the opinions for publication as directed by the Supreme Court. Proof sheets of each opinion in the type to be used in printing the reports shall be submitted by the Reporter of Decisions to the court which prepared the opinion for examination, correction and final approval."[13]

CRC "**Rule 977 CITATION OF UNPUBLISHED OPINIONS PROHIBITED; OPINIONS ORDERED PUBLISHED BY SUPREME COURT**

(a) [**Unpublished opinions**] An opinion that is not ordered published shall not be cited or relied on by a court or a party in any other action or proceeding except as provided in subdivision (b).

(b) [**Exceptions**] Such an opinion may be cited or relied on:

(1) when the opinion is relevant under the doctrine of law of the case, res judicata, or collateral estoppel; or

(2) when the opinion is relevant to a criminal or disciplinary action or proceeding because it states reasons for a decision affecting the same defendant or respondent in another such action or proceeding.

(c) [Citation procedure] A copy of any opinion citable under subdivision (b) shall be furnished to the court and all parties by

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13 *As amended, eff. Jan. 1, 1964; Nov. 11, 1966; Jan. 1, 1972; Jan. 1, 1983; May 6, 1985.*

attaching it to the document in which it is cited, or, if the citation is to be made orally, within a reasonable time in advance of citation.

(d) [Opinions ordered published by Supreme Court] An opinion of the court of Appeal ordered published by the Supreme Court pursuant to rule 976 is citable." [14]

CRC "Rule 978 REQUESTING PUBLICATION OF UNPUBLISHED OPINIONS

(a) **[Request procedure; action by court rendering opinion]** A request by any person for publication of an opinion not certified for publication may be made only to the court that rendered the opinion. The request shall be made promptly by a letter stating concisely why the opinion meets one or more of the publication standards. The request shall be accompanied by proof of its service on each party to the action or proceedings in the Court of Appeal. If the court does not, or by reason of the decision's finality as to that court cannot, grant the request, the court shall transmit the request and a copy of the opinion to the Supreme Court with its recommendation for disposition and a brief statement of its reasons. The transmitting court shall also send a copy of its recommendation and reasons to each party and to any person who has requested publication.

(b) **[Action by Supreme Court]** When a request for publication is received by the Supreme Court pursuant to subdivision (a), the court shall either order the opinion published or deny the request. The court shall send notice of its action to the transmitting court, each party, and any person who has requested publication.

(c) **[Effect of Supreme Court order for publication]** An order of the Supreme Court directing publication of an opinion in the Official Reports shall not be deemed an expression of opinion of the Supreme Court of the correctness of the result reached by the decision of or any of the law set forth in the opinion."[15]

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14 *Adopted, Eff. Jan. 1, 1974. As amended, eff. Jan. 1, 1983; May 6, 1985.* Footnote included in Rule 977: "Any citation to the Court of Appeal opinion shall include reference to the grant of review and any subsequent action by the Supreme Court."

15 *As amended, eff. July 1, 1975; Jan. 1, 1983; July 1, 1992.*

CALIFORNIA CODE OF CIVIL PROCEDURE ("CCP")

CCP "**§529. Undertaking; objection; insufficiency; dissolution of injunction; exceptions.**

(a) On granting an injunction, the court of judge must require an undertaking on the part of the applicant to the effect that the applicant will pay to the party enjoined such damages, not exceeding an amount to be specified, as the party may sustain be reason of the injunction, if the court finally decides that the applicant was not entitled to the injunction. Within five days after the service of the injunction, the person enjoined may object to the undertaking. If the court determines that the applicant's undertaking is insufficient and a sufficient undertaking is not filed within the time required by statute, the order granting the injunction must be dissolved.

(b) This section does not apply to any of the following persons:

(1) Either spouse against the other in a proceeding for legal separation or dissolution of marriage.

(2) The plaintiff in proceedings pursuant to Chapter 4 (commencing with Section 540).

(3) The plaintiff in proceedings pursuant to Setion 7020 of the Civil Code.

(4) A public entity or officer described in Section 995.220."[16]

CCP "**§664.6. Entry of judgment pursuant to terms of stipulation for settlement.** If parties to pending litigation stipulate, in writing or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement."[17]

CCP "**§877.Release of one or more joint tort-feasors or co-obligors; effect upon liability.** Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same

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16 *(Enacted 1872. Amended by Code Am. 1873-74, c. 624, §1; Code Am. 1880, c. 64, §1; Stats. 1907, c. 272, §4; Stats. 1931, c. 140, §1; Stats. 1933, c. 744, §66; stats. 1979, c. 795, §9; stats. 1982, c. 517, §123.)*

17 *(Added by Stats. 1981, c. 904, § 2.)*

tort, or to one or more other co-obligors mutually subject to contribution rights, it shall have the following effect:

(a) It shall not discharge any other such party from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it whichever is the greater.

(b) It shall discharge the party to whom it is given from all liability for any contribution to any other parties.

(c) This section shall not apply to co-obligors who have expressly agreed in writing to an apportionment of liability for losses or claims among themselves.

(d) This section shall not apply to a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment given to a co-obligor on an alleged contract debt where the contract was made prior to January 1, 1988."[18]

CALIFORNIA CIVIL CODE ('CC')

CC "**§1543. One or more joint debtors.** A release of one of two or more joint debtors does not extinguish the obligations of any of the others, unless they are mere guarantors; nor does it affect their right to contribution from him or her, except as provided in Section 877 of the Code of Civil Procedure." [19]

CC "**§1624. Statute of Frauds.** The following contracts are invalid, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent: ...

(c) An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein; such an agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent is in writing, subscribed by the party sought to be charged. ... " [20]

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18 *(Added by Stats. 1957, c. 1700, § 1. Amended by Stats. 1987, c. 677, § 2.)*

19 *(Enacted 1872. Amended by Stats. 1987, c.677, §1.5.)*

20 *(Enacted 1872. Amended by Code Am. 1873-74, c. 612, §190; Code Am. 1877-1878, c. 165, §1; Stats. 1905, c. 451, §1; Stats. 1931, c. 1070, §9; Stats. 1937, c. 316, §2; Stats. 1963, c. 814, §1; Stats. 1967, c. 52, §1; Stats. 1983, c.*

CC "§1636. **Mutual intention to be given effect.** *Contracts, how to be interpreted.* a contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." [21]

CC "§1639. **Ascertainment of intention; written contracts.** *Interpretation of written contracts.* when a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this Title. *(Enacted 1872.)*"

CC "§1646. **Law and usage of place.** *Law of place.* A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made. *(Enacted 1872.)*"

CC "§1648. **Restriction to object.** *Contract restricted to its evident object.* However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract. *(Enacted 1872.)*"

CC "§1649. **Ambiguity or uncertainty; promise.** *Interpretation in sense in which promisor believed promisee to rely.* If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it. *(Enacted 1872).*"

CC"§2309. **Oral and written authorizations.** *Form of authority.* An oral authorization is sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing. *(Enacted 1872.)*"

CC "§2310. **Ratification; manner.** *Ratification of agent's act.* A ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, or where an oral authorization would suffice, by accepting or retaining the benefit of the act, with notice thereof. *(Enacted 1872.)*"

842, §6; Stats. 1985, c. 1315, §1; Stats. 1988, c. 1096, §1; Stats. 1988, c. 1368, §1.5, operative Jan. 1, 1990.) [Note: Stats. 1988, c. 1368, §1.5, operative Jan. 1, 1990 pertains only to subdivision (g), which is not pertinent to this case.]

21 *(Enacted 1872.)*

CC "**§2926. Scope of mortgage lien.** *Mortgage, on what a lien.* A mortgage is a lien upon everything that would pass by a grant of the property. *(Enacted 1872.)*"

CALIFORNIA CORPORATIONS CODE

"**§313. Instrument in Writing and Assignment or Endorsement Thereof; Signatures; Validity.** Subject to the provisions of subdivision (a) of Section 208, any note, mortgage, evidence of indebtedness, contract, share certificate, initial transaction statement or written statement, conveyance or other instrument in writing, and any assignment or endorsement thereof, executed or entered into between any corporation and any other person, when signed by the chairman of the board, the president or any vice president and the secretary, any assistant secretary, the chief financial officer or any assistant treasurer of such corporation, is not invalidated as to the corporation by any lack of authority of the signing officers in the absence of actual knowledge on the part of the other person that the signing officers had no authority to execute the same."

STATEMENT OF THE CASE

The pertinent facts of this case are undisputed.[22]

In mid-1986, Petitioner's predecessor in title (i.e., the 'Venture Fund' limited partnership)[23] entered into an Agreement to sell certain real property to Respondent (and a joint venture partner, i.e., the Jonathan Group[24]). The initial Agreement was later amended to

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22 Only one instance of a factual dispute was cited by the California Court of Appeal; see footnote # 33, infra.

23 Petitoner is the former General Partner of the Venture Fund limited partnership, who received the Assignment of Venture Fund's interest in the Mortgage (Note and Deed of Trust) on the Bay Village property upon the expiration of the stated term of the partnership, in December of 1991 (Record at pp. 543-547). Therefore, Petitioner is not a holder in due course, and remains accountable to the partners in the former Venture Fund limited partnership for any recovery which may ultimately occur on the Mortgage (Note and Deed of Trust).

24 The actual joint venture partner was called JP Village Bay Partners, and was a limited partnership with Jonathan Group Properties, Inc., as its General Partner and Messers. Kauftheil and Chase as its limited partners. Jonathan Group Properties, Inc. was a wholly owned subsidiary of Jonathan Group, Inc. Messers.

provide that Venture Fund would transfer its Option to Purchase the real property to Respondent's Joint Venture and that Respondent's Joint Venture would then acquire the real property, instead of Venture Fund first acquiring the real property pursuant to its Option and then transferring title to Respondent's Joint Venture.[25]

Pursuant to the amended Agreement, Respondent's Joint Venture[26] acquired Venture Fund's Option and completed the purchase of the real property (hereafter the 'Bay Village' property) on June 13 thru 16, 1986, and issued a First Mortgage to Venture Fund in the amount of One Million Dollars ($1,000,000) for a portion of the purchase price. The Mortgage was in the form of a Promissory Note and a Statutory Short Form Deed of Trust.[27]

Subsequently, Respondent's Joint Venture failed to pay Venture Fund's First Mortgage when due, and Venture Fund commenced a non-judicial foreclosure to enforce payment. Respondent's Joint Venture (through Messers. Kauftheil and Chase) then filed suit in the Solano County Superior Court to enjoin Venture Fund's foreclosure,[28] and secured a preliminary injunction by posting a Cash Bond in lieu of undertaking pursuant to CCP 529.[29] Venture Fund then filed a Cross-Complaint for damages for 'abuse of process' and other tortious acts committed by Respondent's Joint Venture (through Messers. Kauftheil and Chase).[30] Respondent's Joint Venture made its first and only payment to Venture Fund on its Mortgage, at the time it filed its suit for injunction.[31]

Kauftheil and Chase each owned 50% of Jonathan Group, Inc. Mr. Kauftheil formed these various entities as 'attorney' and 'chief financial officer' for Jonathan Group, Inc. but testitifed that they were only formed "for accounting purposes". -- Record at pp. 152-154, and 758.

25 Record at p. 37.

26 I.e., called "Village on the Bay Development" – Record at pp. 1-2.

27 Record at pp. 41-45.

28 Record at p. 1-55.

29 California Code of Civil Procedure ('CCP') § 529; Record at pp. 63-66.

30 Record at pp. 93-151.

31 The partial payment of $400,000 was paid in April of 1987; in addition Respondent's Joint Venture was allowed setoffs totaling $159,575 for payments made by the Joint Venture which were properly allocable to Venture Fund, as specified in the Complaint and Answer in the Record at pp. 1-21, and pp. 67-89.

During the next two (2) years, the litigants pursued discovery,[32] while Respondent's Joint Venture constructed an apartment project on the Bay Village property. And, when the construction was essentially complete, Respondent and Jonathan Group proceeded to dissolve their 'Joint Venture' effective January 16, 1989.[33]

By terms of the dissolution of the 'Joint Venture', Respondent acquired the fee title to the Bay Village property by 'Grant Deed',[34] and assumed the obligation to pay 'all liens and encumbrances' on the Bay Village property, and issued a blanket 'release', 'hold-harmless' and 'indemnity' against any further liability relating to the former 'joint venture' to Messers. Kauftheil and Chase (i.e., Jonathan Group, Inc., and its affiliates).[35] Messers. Kauftheil and Chase also received the reversionary interest in the fund posted as the Cash Bond in lieu of undertaking on the preliminary injunction halting Petitioner's non-judicial foreclosure.[36]

After the dissolution of the 'joint venture' had been completed, Messers. Kauftheil and Chase (through counsel) then approached Petitioner regarding the possibility of settling the pending suits. This resulted in the mediated non-judicial settlement conference between Petitioner and Messers. Kauftheil and Chase held in San Francisco on June 19, 1989, which is where the current dispute began.

According to Petitioner's Declaration:

> "9. That Amy Matthew [Respondent's counsel] was asked a direct question by the Mediator at the beginning of the Settlement Conference (at approximately 10:30 AM on June 19, 1989), and stated in response that 'PACIFIC SAVINGS BANK was not present or represented at the Settlement Conference', that they ('Amy Matthew and her associate) represented the

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32 As summarized in the Record at pp. 669, et seq., discovery revealed that the claims asserted by Kauftheil and Chase in order to secure the preliminary injunction were false or grossly exaggerated, thus increasing the potential for an award of substantial damages on Petitioner's 'Abuse of Process' and other tort claims.

33 The dissolution documents are dated at various times during the period from January thru May of 1989, and appear in the Record at pp. 470, 474, and 479.

34 Record at p. 474.

35 Record at p. 479

36 Record at pp. 640-646.

JONATHAN GROUP' (referring to KAUFTHEIL and CHASE, who were seated beside her), and were 'not authorized to represent the PACIFIC SAVINGS BANK at the Settlement Conference'."[37]

However, Respondent's counsel (Amy Matthew) disputed this portion of Breck's Declaration,[38] stating in response that:

"2. I have reviewed the Declaration of WILLIAM H. BRECK ('BRECK') filed in support of his alleged 'Motion for Sanctions'. His hearsay statements concerning my lack of authority to represent all of the plaintiffs are blatantly false.

3. At all times during this litigation, Miller Starr & Regalia has represented all of the plaintiffs in this action, including both partners to the joint venture. This representation began upon initiation of the Complaint, the issuance of the Temporary Restraining Order and the Order granting preliminary injunction. Miller Starr & Regalia continued to represent all plaintiffs through the settlement, and the distribution of the assets in the escrow account. Indeed, the Court's record confirm this firm's representation of both partners to the joint venture, (see Order Granting Preliminary Injunction, Stipulation for Disbursement of Funds and Order Thereon)."[39]

It is **undisputed**, however, that Respondent (i.e., Pacifica Bay Village Associates, Inc.) and its affiliates (i.e., PSB Realty, Inc. and Pacific Savings Bank) were **not** present or represented by any authorized executive officer at the settlement conference, and **no** documentary evidence or testimony of any executive officer was ever produced to clarify, confirm or elucidate Ms. Matthew claimed 'representation' of "all of the plaintiffs in this action".[40]

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37 Petitioner's Declaration dated June 22, 1992; Record pp. 266-288, at p. 271.

38 This is the only 'conflict' in evidence noted in the Court of Appeal Decision to which this Petition for Writ of Certiorari pertains; See Appendix at A-1.

39 As in original; Declaration dated July 20, 1992; Record pp. 637-639, at 638.

40 No further declaration testimony or documentary evidence was submitted by counsel for Respondent to clarify this statement regarding the 'representation' of "all of the plaintiffs in this action", even though Petitioner objected in the Trial Court to any reliance on Ms. Matthew's statement of 'representation' as a statement of authority; Record at pp. 652-654.

Hence, the 'Memorandum of Settlement', prepared in the hand-writing of Ms. Amy Matthew late in the day on June 19, 1989, bears no signature purporting to be that of Pacific Savings Bank, PSB Realty, Inc., or Respondent (Pacifica Bay Village Associates, Inc.).[41] In addition to Petitioner and his counsel, the 'Memorandum

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41 The hand-written 'Memorandum of Settlement' (Record at pp. 186-190) read:

" Memorandum of Settlement

The parties hereto acknowledge and confirm that a settlement has been effected as of June 19, 1989 and also acknowledge that a more formal settlement agreement shall be prepared and executed by the parties hereto. With this understanding, the parties agree to the following terms:

1. The Complaint filed by plaintiff Jonathan Group, Inc., et al., against Venture Fund I and its general parther William H. Breck, later amended to assert claims against defendant Bissell & Karn Inc. (and identified as Solano Superior Court Action No. 97166) shall be dismissed with prejudice. The Cross-Complaints filed by Venture Fund I and its general partner William H. Breck against Jonathan Group, Inc. et al shall be dismissed with prejudice. The Cross-Complaint filed by Bissell & Karn, Inc. against Jonathan Group, Inc. et al shall be dismissed with prejudice.

2. The approximate sum of $641,877.75 is held on account at Wells Fargo Bank, pursuant to the joint escrow instructions of Jonathan Group, Inc. et al and William H. Breck, et al and identified as First American Title Insurance Co. escrow no. 753618;

3. Venture Fund I and its general partner William H. Breck shall receive the sum of $280,000.00 from the above referenced escrow account;

4. The balance of said funds on deposit shall be paid to Jonathan Group, Inc.

5. All parties hereto agree that the settlement is a complete and final settlement of all known and unknown claims arising out of Action No. 97166;

6. This Agreement is intended to, and shall be construed as, a binding and enforceable agreement between the parties hereto.

Dated: June 19, 1989 /s/ William H. Breck
William H. Breck, General Partner
Venture Fund I and individually

June 19, 1989 /s/ James E. Douglas
James E. Douglas Counsel for
William H. Breck and Venture Fund I

June 19, 1989 /s/ Lee Kauftheil
Lee L. Kauftheil, Secretary of
Jonathan Group, Inc.,

of Settlement' was signed only by "L. Lee Kauftheil" as "Secretary of Jonathan Group, Inc., and as individual"; by "Gary L. Chase" as "President Jonathan Group, Inc., and as individual"; and by "Amy Matthew" as "counsel for Jonathan Group, Inc. et al".[42]

It is undisputed that the 'Memorandum of Settlement" contains no reference to the previously dissolved 'Joint Venture'; that it contains no reference to the Note, or to the Deed of Trust, which all parties knew was then outstanding in the possession of Venture Fund; and that it contains no reference to the Bay Village property or to any 'lien or encumbrance' on the Bay Village property.

It is undisputed that the 'Memorandum of Settlement' contains no mention of any Real Property; that it contains no mention of the Name of Respondent (who was then the sole Owner of the Real Property; that it contains no mention of the Mortgage interest of Venture Fund in the Real Property; that it contains no mention of the underlying Debt secured by the Mortgage on the Real Property; that it contains no indication of any intent to 'pay-off', to 'satisfy', or to 'discharge' the underlying Debt; that it contains no indication of any intent to secure a 'release', or 'reconveyance', or 'satisfaction' of the Mortgage Lien; and it contains no indication of any intent to

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and as individual

June 19, 1989 — /s/ Gary L. Chase
Gary L. Chase, President
Jonathan Group, Inc.,
and as individual

June 19, 1989 — /s/ Amy Matthew
Amy Matthew Counsel for
Jonathan Group, Inc. et al

June 19, 1989 — /s/ Robert Karn
Robert Karn, Vice President
Bissell & Karn, Inc.

June 19, 1989 — /s/ Ernest Sevier
Ernest Sevier, Counsel for
Bissell & Karn, Inc."

42 "Robert Karn" as "Vice President Bissell & Karn, Inc." and his counsel (Ernest Sevier) as "Counsel for Bissell & Karn, Inc." - also participated, to settle claims between Jonathan Group against Bissell & Karn (the Engineers for the construction project). However, they are not involved in the subsequent dispute between Petitioner and Respondent (Pacifica Bay Village Associates, Inc.).

'remove the cloud from' or to 'extinguish the lien on' the title to the Real Property.

It is undisputed that Messers. Kauftheil and Chase (and their Jonathan Group affiliates) had no interest in the Bay Village property (or in the liens and encumbrances on the Bay Village property) at the time of the settlement conference; that Respondent (Pacifica Bay Village Associates, Inc.) had the entire fee interest in, and sole responsibility for all liens and encumbrances against, the Bay Village property, by virtue of the prior 'Grant Deed' and the prior 'express assumption' of all liens and encumbrances on the Bay Village property.

And, it is undisputed that Messers. Kauftheil and Chase did not have (or claim to have) any authority to represent or bind the former 'Joint Venture' or Respondent;[43] that no part of the payment to Venture Fund (pursuant to the 'Memorandum of Settlement') was made from funds owned or claimed by Respondent;[44] and that Respondent provided no consideration whatsoever to Venture Fund (or Petitioner) in relation to the settlement by Venture Fund with Messers. Kauftheil and Chase (i.e., Jonathan Group and affiliates).

A few days after the settlement conference with the Messers. Kauftheil and Chase, their counsel prepared and submitted to Petitioner a 'Stipulation Re Disbursement of Funds' providing for the funds previously deposited as the Cash Bond[45] to be disbursed to Petitioner and Jonathan Group, Inc. in accordance with the 'Memorandum of Settlement'.

In addition to Petitioner and his counsel, the 'Stipulation Re Disbursement of Funds' was signed by "L. Lee Kauftheil" as

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43 The 'Notice of Dissolution of Partnership' specifically provided that: "After January 16, 1989, no member of Village On The Bay Development may bind the joint venture except for Pacifica Bay Village Associates, Inc." -- Record at p. 470.

44 Declaration of L. Lee Kauftheil at Record at pp. 640-646.

45 Note that the 'Memorandum of Settlement' (at footnote 42, supra) erroneously refers to the Cash Bond in paragraph 2 as funds "held on account at Wells Fargo Bank, pursuant to the joint escrow instructions of Jonathan Group, Inc. et al and William H. Breck, et al". However, there was no such "joint escrow instructions". No significance has been attached to this erroneous reference, since the Cash Bond is also correctly identified as the funds held in "First American Title Insurance Co. escrow no. 753618".

"Secretary of Plaintiff, Jonathan Group, Inc."; and by "Edmund L. Regalia" (of "Miller Starr & Regalia") as "counsel for Plaintiffs Jonathan Group, Inc." [46]

Following the disbursement of funds to Venture Fund pursuant to the 'Memorandum of Settlement' and the 'Stipulation Re Disbursement of Funds' Ms. Matthew sent to Petitioner's counsel a typed draft proposed 'formal settlement agreement', which was then forwarded to Petitioner in Alaska. Ms. Matthew's after-the-fact proposed 'formal settlement agreement' contained much broader language than was contained in the June 19, 1989 'Memorandum of Settlement', including proposals that Petitioner satisfy the Mortgage debt from Respondent to Venture Fund and release the lien of Venture Fund's Trust Deed on the Bay Village property.[47]

Petitioner objected to the proposed expanded scope of the settlement and refused to sign Ms. Matthew's after-the-fact proposed 'formal settlement agreement', by letter dated August 1, 1989,[48] approximately six (6) weeks after the June 19, 1989 settlement with Messers. Kauftheil and Chase. Petitioner's counsel later advised Ms. Matthew that Petitioner had "problems" with the language.[49]

On October 13, 1989, approximately 4 months after the June 19, 1989 settlement conference, the Resolution Trust Corporation seized the assets of Pacific Savings Bank (which included Respondent, as a wholly owned subsidiary of Pacific Savings Bank), and commenced its insolvency liquidation.[50]

Subsequently, neither Petitioner nor Respondent pursued the litigation, although Petitioner remained in periodic contact with the Resolution Trust Corporation and did negotiate to acquire the Bay Village property using the 'equity' of Petitioner's unsatisfied First Mortgage lien on the property.[51]

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46 Record at pp. 191-192.

47 Record at pp. 234-20, et seq.; and Declaration at 266, et seq.

48 Record at pp. 266, et seq.; pp. 669, et seq.; and pp. 719, et seq.

49 Record at pp. 234-32, et seq.

50 Record at pp. 725-728.

51 Record at pp. 266-290; pp. 518-542; pp. 669-694; pp. 729-732.

However, problems arose during the negotiations with the Resolution Trust Corporation because a Title Report delivered to Resolution Trust Corporation by First American Title Insurance Co. (aka First American Title Guaranty Co.) did not list Petitioner's First Deed of Trust as an encumbrance on the Bay Village property.[52] This provoked an exchange of letters between Petitioner and First American Title, which led to a meeting between Petitioner and a representative of First American Title on May 21, 1992, and thereafter to the request from First American Title to Ms. Matthew to take whatever actions were necessary to obtain a 'full reconveyance' of Petitioner's First Mortgage lien against the Bay Village property.[53]

Concurrently, the Solano County Superior Court issued a Notice of Intent To Dismiss the litigation,[54] to which Petitioner and Ms. Matthew filed simultaneous responses on June 12, 1992. Petitioner concurred in the dismissal and advised the Court of the interest of the Resolution Trust Corporation in the litigation by virtue of the seizure of Pacific Savings Bank.[55] Ms. Matthew opposed the dismissal and requested the court to declare Petitioner's Note and Deed of Trust to be 'satisfied and discharged'.[56]

Petitioner then filed an opposition to Ms. Matthew's Motion, and requested the Court to impose sanctions on Ms. Matthew for misrepresentations made in her moving papers,[57] and both parties

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52 The Title Report issued to the Resolution Trust Corporation was apparently based on the Title Policy issued in 1987 to Far West Savings & Loan Association (also closed by Resolution Trust Corporation) insuring the 'construction loan' to the Jonathan Group and Respondent as in First Mortgage position (based on an agreement with Jonathan Group to insure around the Petitioner's First Mortgage Lien), as disclosed by the 'Construction Loan Deed of Trust' dated March 25, 1987 (Record pp. 554-606), and 'Supplementary Escrow Instructions & Indemnity Agreement' to First American Title dated April 8, 1987 (Record pp. 51-54).

53 See summary of these activities at Record pp. 280-287, and copies of related documents in Record at pp. 506-553, and pp. 608-609.

54 Record at p. 607.

55 Record at pp. 195-221.

56 Record at pp. 222 et seq.

57 Record at pp. 235-609.

filed supplemental declarations and exhibits demonstrating the procedural and factual history summarized above.[58]

On August 4, 1992[59] and August 6, 1992,[60] the Solano County Superior Court ruled (without meaningful findings of fact or conclusions of law) that Petitioner's Mortgage (i.e., Note and Deed of Trust) were deemed "satisfied" and "void".[61] Petitioner's Motion for Reconsideration and supplemental relief were denied,[62] and Petitioner appealed to the Court of Appeal for the First District.[63]

Although the Court of Appeal acknowledged that Respondent was not present at the June 19, 1989 settlement conference and did not sign the 'Memorandum of Settlement', it nevertheless ruled that Ms. Matthew's signature on the June 19, 1989 'Memorandum of Settlement' "effectively bound all her clients" to the settlement agreement.[64] Therefore, the Court of Appeal affirmed the Superior Court's Orders declaring Petitioner's Mortgage Note to be "satisfied" and Deed of Trust to be "void".[65]

No legal authority was cited for the Court's ruling, and the sole fact noted as arguable basis for its holding was that:

> "Matthew signed the agreement as 'Counsel for Jonathan Group Inc et. al' (emphasis added); and it is undisputed that Matthew represented all the respondents in this case, including Pacific Savings Bank and its related entities, in all legal pleadings filed in this case."[66]

The Court of Appeal also held that it was required to defer to the Trial Court's determination because of 'conflicting evidence' regarding what was said by Ms. Matthew at the beginning of the

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58 Record at pp. 617-870.

59 Record at pp. 871; Appendix at A-10.

60 Record at pp. 887; Appendix at A-12.

61 See Orders dated August 4, and August 6, 1992 in Appendix at A-10 - A-14.

62 Record at pp. 944 and 977.

63 Record at pp. 916; Appendix at A-17.

64 Court of Appeal Decision in Appendix at p. A-7 thru A-8.

65 Orders in Appendix at pp. A-10 and A-12.

66 Court of Appeal Decision in Appendix at p. A-7 to A-8.

settlement conference on June 19, 1989,[67] and cited in support of the Trial Court's conclusion, the "failure [of Petitioner] to object ... for over one year"[68] to the after-the-fact draft 'final settlement agreement' proposed by Ms. Matthew.

The Court of Appeal also refused to apply the 'statute of frauds' and 'equal dignities rule' since:

> "the parties to be charged (appellants) clearly signed the June 19, 1989, settlement agreement. It is irrelevant, under the statute of frauds and the equal dignities rule, whether parties who admit the validity of an agreement have written authority to sign."[69]

And, Petitioner's contention that "since neither Pacific Savings Bank nor its related entities signed the agreement, we cannot conclude it was enforceable as to them," was rejected because:

> "We reject this argument for two reasons. First, appellants raised this issue for the first time in their reply brief and, thus have waived the right to assert it on appeal. [citation omitted.] Second, as with the statute of frauds, we see no reason to apply this rule where, as here, the parties who have not signed the agreement admit its validity." [70]

And, the Court of Appeal ordered that its Decision was "NOT TO BE PUBLISHED IN OFFICIAL REPORTS"[71] pursuant to California Rules of Court ('CRC') §§976-978.

Petitioner promptly submitted a letter to the Court of Appeal requesting Publication of its Decision,[72] as required by CRC §976-978, because the Decision clearly announced a 'new rule of law' of great public importance, and filed a Petition for Rehearing.[73]

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67 Court of Appeal Decision in Appendix at p. A-6.

68 Court of Appeal Decision at p. A-9.

69 Court of Appeal Decision in Appendix at p. A-8.

70 Court of Appeal Decision in Appendix at p. A-8.

71 Court of Appeal Decision in appendix at p. A-1.

72 Appendix at pp. A-19 thru A-24.

73 Appendix at pp. A-25 thru A-46.

The Petition for Rehearing pointed out that the 'new rule of law'[74] stated in the Court of Appeal's Decision, was contrary to the controlling Decision of the California Supreme Court in Mesler v. Bragg Management Co., 39 Cal.3d 290, 216 Cal.Rptr. 443, 702 P.2d 601 (1985), involving very similar facts,[75] and was also inconsistent with the governing California statutes.[76]

The Petition also requested Rehearing because Respondent's counsel never claimed to have the authority to bind all of her absent clients to the settlement, and neither party had notice or opportunity to address the 'new rule of law' announced by the Court.[77]

And, the Petition pointed out that, since the Court of Appeal acknowledged[78] that Respondent was not present during the negotiations or a signatory to the settlement agreement, the 'conflict in evidence' cited as the sole basis for deference to the Trial Court, was not a material conflict, (1) because the respective statements were not in conflict in fact, and (2) if in conflict in fact, the conflict was not material to the determination of any fact required for the interpretation of the written 'Memorandum of Settlement'.[79]

The Petition also called to the Court's attention that the evidence of Petitioner's "objection" to Ms. Matthew's after-the-fact proposed 'final settlement agreement' was in the Record at pp. 277-278 and 719[80] (contrary to the Court's stated reliance on the supposed "fact" that "when [Ms. Matthew's after-the-fact proposed 'final settlement agreement'] was forwarded to appellants and their counsel, neither raised any objection for over one year").[81]

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74 That an attorney could, by only her own signature as "counsel for [a different client] et al", and without any other authority than relates to having filed "legal pleadings in the case" for the client, bind all of her absent clients to a settlement agreement naming only a different client (and thereby obtain blanket releases for the benefit of all of her other clients). Decision at pp. A-6 to A-7, and A-7 to A-8.

75 Appendix at pp. A-28 thru A-30.

76 Appendix at pp. A-30 thru A-32.

77 Appendix at pp. A-32 thru A-33.

78 Court of Appeal Decision in Appendix at p. A-8.

79 Appendix at pp. A-34 thru A-37.

80 Appendix at pp. A-37 thru A-41.

81 Court of Appeal Decision in Appendix at p. A-8 and A-9.

Petitioner also requested Rehearing because the Court had misapplied the 'Statute of Frauds' and 'Equal Dignities Rules',[82] and the Court had disregarded the normal rules governing the interpretation of contracts ('ejusdem generis', and 'expresio unis exclusio alterus') in determining the meaning of the phrase "et al".[83]

However, Petitioner's Petition for Rehearing and request for publication of the Court's Decision were denied.[84]

Petitioner than raised the same points in its Petition for Review to the California Supreme Court,[85] together with the additional points that the Court of Appeal Decision violated Petitioner's rights under the 'due process', 'equal protection', and 'privileges and immunities' clauses,[86] and under the 'contract clause'.[87]

However, on September 1, 1993, the California Supreme Court denied Petitioner's Petition for Review, and denied Petitioner's request for publication of the Court of Appeals Decision.[88]

This Petition for Writ of Certiorari was then filed in the United States Supreme Court within 90 days thereafter, to seek review of the Constitutional issues presented by the California Court of Appeals Decision and De-Publication Order in this case.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeal's Decision offends the standards mandated by the 'due process clause', the 'equal protection clause', and the 'privileges and immunities clause' of the 14th Amendment, and the 'contract clause' in Article I, Section 10, of the United States Constitution

a. by refusing de novo review and abdicating its judicial responsibility to apply its independent judgment to the interpretation of a written contract on undisputed facts, by giving "substantial

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82 Appendix at pp. A-41 thru A-44.

83 Appendix at pp. A-44 thru A-45.

84 Appendix at pp. A-47 and A-49.

85 Appendix at pp. A-50 thru A-86.

86 14th Amendment to the United States Constitution.

87 Article I, § 10 of the United States Constitution.

88 Appendix at A-87.

deference" to the Trial Court's determination based on a "conflict in evidence", which is (1) not a conflict in fact, and (2) not material to the interpretation of the written contract before the Court;[89]

b. by basing its decision upon Petitioner's "failure to object ... for over one year", contrary to undisputed documentary evidence in the Record showing that Petitioner did "object" within a few weeks after receiving Ms. Matthew's after-the-fact proposed draft 'final settlement agreement';[90]

c. by disregarding the governing Statute Law of the State of California with reference to which Petitioner's Mortgage (Note and Deed of Trust), and the subject 'settlement agreement', were made (including specifically the 'Statute of Frauds' in CC §1624), on an undisputed factual Record showing that (1) the subject 'agreement' contains no reference to the Real Property or to the Property Owner; (2) the subject 'agreement' contains no reference to the Mortgage (Note or Deed of Trust); and (3) the subject 'agreement' contains no indication of any intent to 'pay', 'satisfy', or 'discharge' the Mortgage debt or lien;[91]

d. by disregarding the governing Statute Law of the State of California with reference to which the subject 'settlement agreement' was made (including specifically the 'Equal Dignities Rule' of CC §2309, applicable to out-of-court 'settlement agreements' by virtue of by CCP §664.6), on an undisputed factual Record showing that (1) the Property Owner did not participate in the negotiations or authorize or sign the 'agreement' by or through any authorized officer; (2) the attorneys for the Property Owner did not claim (or

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89 Burns v. Wilson, 346 US 137, 142-143, 73 S.Ct. 1045, 97 L.Ed. 1508 (1953), reh. den. 346 US 844, 74 S.Ct. 3, 98 L.Ed. 363 - "'due process' is ... sufficiently adaptable, to protect ... from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudamentary fairness rather than finding truth through adherence to ... basic guarantees."

90 McNickle v. Bankers Life and Casualty Co., 888 F.2d 678, 680 (10th CA, Okl., 1989) – "A clear example of ... abuse of discretion is where the ... court fails even to consider either [the] applicable legal standard or the facts upon which the exercise of its discretionary judgment is based."

91 Sun Oil Co. v. Wortman, 486 US 717, 108 S.Ct. 2117, 100 L.Ed.2d 743 (1988) –A misconstruction of state law that contradicts clearly established law that has been brought to court's attention may violate the Due Process Clause.

produce evidence of) 'written authority' to enter into the out-of-court 'settlement agreement' for or on behalf of the Property Owner; and (3) no other person present had authority to contract for or on behalf of the Property Owner;[92]

e. by disregarding the governing Decision of the California Supreme Court in Mesler v. Bragg Management Co., 39 Cal3d 290, 305-306 216 CR 443, 702 P2d 601 (1985), which clearly established that a corporate client, not "expressly include[d]" as a named party to a compromise settlement of litigation, "[c]ould not magically benefit from [an] agreement" relating to a different corporate client, even when the corporate clients are related (e.g., alter ego liability), and are represented by the same attorney;[93]

f. by adopting an 'unexpected' 'new rule of law' (not based on statute or prior Court Decision, and rejected by every other Court to consider the issue)[94] that: an attorney may include, and "bind", an 'absent-unnamed client', while appearing to negotiate a 'settlement agreement' for a different client, **if only (1)** the attorney has previously filed 'legal pleadings' in court for the 'absent-unnamed client', **and (2)** the attorney signs the agreement as "counsel for [the 'other' client's name] et. al" (emphasis added), without otherwise disclosing the 'absent-unnamed client' to the adverse party, and without the authority, knowledge, consent or participation of the 'absent-unnamed client';[95]

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92 Id.

93 Id.

94 McGirr v. Gulf Oil Corp., 41 CA3d 240, 115 CR 902 (CA, 2nd dist., 1974); Blanton v. Womancare, Inc., 38 Cal.3d 396, 212 CR 151, 696 P.2d 645 (1985); Mesler v. Bragg Mangament Co., 39 Cal.3d 290, 216 CR 443, 702 P2d 601 (1985); Datatronic Systems Corp. v. Speron, Inc., 176 CA3d 1168, 222 CR 658 (CA, 2d Dist., 1986); City of Fresno v. Maroot, 189 CA3d 755, 234 CR 353 (CA, 5th Dist., 1987); Gallo v Getz, 205 CA3d 329, 252 CR 193 (CA, 4th Dist., 1988).

95 Midnight Sessions, Ltd. v. City of Philadelphia, 945 F.2d 667 (3rd CA, Pa., 1991) - cert. den. 112 S.Ct. 1668, 118 L.Ed.2d 389 – substantive 'due process' protects against arbitrary abuse of power even if procedures comport with procedureal 'due process' requrements; Schwendeman v. Wallenstein, 971 F.2d 313 (9th CA, Wash., 1992), cert. den. 113 S.Ct. 975, 122 L.Ed.2d 130 – factual inference may violate 'due process' when court cannot say with substantial assurance that inferred fact is more likely than not to flow from proven fact on which it is made to depend; Blair v. Armontrout, 916 F.2d 1310, 1343 (8th CA,

g. by applying the 'unexpected' 'new rule of law' to the disadvantage and destruction of valuable property interests of Petitioner (a Non-Resident of California), by declaring Petitioner's Mortgage (Note and Deed of Trust) to be deemed "satisfied" and "void", without giving Petitioner notice and opportunity to address the merits and application of the 'unexpected' 'new rule of law';[96]

h. by De-Publishing its Decision, contrary to CRC 976(b),[97] and contrary to Petitioner's request to Publish the Decision[98]:

(i) to prevent 'notice', debate, discussion and criticism of the 'new rule of law' applied by the Court in this case;[99] and

(ii) to prohibit 'citation' of, and 'reliance' on, the Decision in any other case or proceeding.[100]

II. The Court of Appeal's Decision deprives Petitioner of 'property' contrary to the 'contract clause' in Article I, Section 10, and the 'due process' and equal protection' clause of the 14th Amendment to the United States Constitution

Petitioner, as an Alaska citizen, is entitled to 'equal' treatment with California citizens when required to submit to adjudication in

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Mo., 1990) - "Judicial decisions are judged by their consistency and state courts must abide by their constructions of their own law. Godfrey v. Georgia, 446 US 420, 432, 100 S.Ct. 1759, 1767, 64 L.Ed.2d 398 (1980)."

96 Whirlpool Corp. v. Ritter, 929 F.2d 1318, 1323 (8th CA, Ark., 1991) - "individuals are entitled to rely on the law governing ... contracts when the contracts were made," hence, retrospective application of substantial change in law violates 'contract clause' when the law "directly alters the obligations and expectations of the contracting parties, is not merely general, social legislation ... [unless] it is 'reasonable ... and of a character approporate to the public purpose justifying its adoption"; Blair v. Armontrout, 916 F.2d 1310 (8th CA, Mo., 1990), cert. den. 112 S.Ct. 89, 116 L.Ed.2d 62 – 'due process' principles prevent state court from retrospective application of unforeseeable doctrinal change; In re Simmons, 129 B.R. 84 (Bk., ND, W. Va., 1991) – stripping secured creditor of vested rights in collateral by change in law upon which creditor had relied, and with which creditor had complied, violates 'due process'; Allied Structural Steel Co. v. Spannaus, 438 US 234, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978); Exxon Corp. v. Eagerton, 462 US 176, 103 S.Ct. 2296, 76 L.Ed.2d 497 (1983).

97 California Rules of Court §976(b).

98 Appendix at pp. A-19 thru A-24.

99 California Rules of Court § 976(e).

100 California Rules of Court § 977(a).

the California Courts a property interest protected by the United States Constitution. -- Shelly v. Kramer, 334 US 1, 68 S.Ct. 836, 92 L.Ed.2d 1161 (1948); Zobel v. Williams, 457 US 55, 102 S.Ct. 2309, 72 L.Ed.2d 672 (1982); Hicklin v. Orbeck, 437 US 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978); Hess v. Committee for Indus. Org., 307 US 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1938); US v. Harris, 106 US 629, 1 S.Ct. 601, 27 L.Ed. 290 (1882); Lassiter v. Dept of Social Services, 452 US 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981); Carey v. Piphus, 435 US 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978).

A mortgage (Note and Deed of Trust) on California real property is clearly a valuable 'property interest' under California law, and within the protection of the United States Constitution. -- CC 2926;[101] Parrish v. Greco, 258 P.2d 566, 118 CA2d 556 (1953); Everts v. Matteson, 132 P.2d 476, 21 C.2d 437 (1942); Cornelison v. Kornbluth, 125 Cal.Rptr. 557, 542 P.2d 981, 15 C.3d 590 (1975); Mennonite Bd. of Missions v. Adams, 462 US 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983).

And it is clear that Petitioner's fundamental right of 'fair access' and 'equal treatment' with California citizens on review by the Court of Appeal (exercising independent judgment to apply the pertinent statutes and decisional law of the State to the interpretation of a written contract with all material facts undisputed) was violated by the Court of Appeals abdication of judicial responsibility in this case. -- California Code of Civil Procedure ('CCP') §901, §902, §904, §904.1, §906, §909; People v. Lewis, 42 Cal.3d 969, 984-988, 232 CR 110, 728 P.2d 180 (1986); FPI Development, Inc. v. Nakashima, 231 CA3d 367, 282 CR 508 (CA, 3d Dist., 1991); In Re Williams, 29 CA3d 368, 105 CR 406 (1972); Parsons v. Bristol Development Co., 62 Cal.2d 861, 865-866, 44 CR 767, 770-771 & ftnt. 2 (1965); Stratton v. First National Life Ins. Co., 210 CA3d 1071, 258 CR 721, 727-728 (1989); Stevenson v. Oceanic Bank, 223 CA3d 306, 315, 272 CR 757, 762 (1990); McNickle v. Bankers Life and Casualty Co., 888 F.2d 678 (10th CA, Okla., 1989); Faile v. Upjohn Co., 988 F.2d 985 (9th CA, Nev., 1993); Bulloch v. U.S., 763 F.2d 1115 (10th CA, Utah, 1990), cert. den.

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101 California Civil Code §2926.

474 US 1086, 106 S.Ct. 862, 88 L.Ed.2d 900; Matter of Whitney-Forbes, Inc., 770 F.2d 692 (7th CA, Ill., 1985); Lindsey v. Normet, 405 US 56, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972).

The Court of Appeal's disregard of the undisputed evidence in the Record before it [102] also deprived Petitioner of 'due process of

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102 Petitioner's letter to attorney Douglas dated August 1, 1989, protesting Ms. Matthew's after-the-fact 'formal settlement agreement' proposal, appears in the Record at p. 719, and reads as follows:

" Re: Venture Fund I - Settlement with the Jonathan Group

Dear Jim: ¶ This letter is to confirm for your files our prior telephone conversations regarding the settlement entered into with the Jonathan Group on June 19, 1989, with particular reference to the expanded document entitled "Settlement Agreement and Mutual Release" submitted by the Jonathan Group's attorneys through you for my signature.

As you are aware, the Pacific Savings Bank did not attend the settlement meeting (mediation) on June 19, 1989, and the fact that the Pacific Savings Bank was not a participant in the settlement discussions was specifically confirmed to us by Mr. Anthony Piazza, the mediator, in our first separate meeting with him, after his extended separate meeting with the Jonathan Group (Lee Kauftheil and Gary Chase) and their attorneys. Hence, the entire course of our discussions during the approximately six hours devoted to the mediation and settlement on June 19, 1989, were premised on the fact that we were dealing only with the Jonathan Group, and not Pacific Savings Bank, in developiong this compromise settlement.

Moreover, when the hand-written "Memorandum of Settlement", as prepared by the Jonathan Group's attorneys, was finally submitted to us, there was no mention of the Pacific Savings Bank in the hand-written agreement. Also, there was nothing in the hand-written agreement inconsistent with the preservation of Venture Fund's rights against Pacific Savings Bank. And further, Mr. Piazza, the mediator, again stated when presenting the agreement, that he was sorry that Pacific Savings Bank had not been involved in this mediation, since, in his opinion, we would have accomplished a great deal more from the time and effort invested in the mediation by all of the parties, and particularly by you and me.

In this regard, I also consider it significant that the Jonathan Group's "Memorandum of Settlement" did not mention our pending foreclosure, or our Promissory Note, even though all parties were fully aware of our claims against the Jonathan Group and Pacific Savings Bank in relation to the Promissory Note and foreclosure, in addition to our claims in the litigation.

For these reasons, as well as others, it is my understanding that the Jonathan Group's intention, as well as our intention, by this settlement, was merely to resolve the various claims asserted by the Jonathan Group against me and Venture

law' in its most fundamental sense. -- Gonzoles v. U.S., 348 US 407, 75 S.Ct. 409, 99 L.Ed. 467 (1955); McNickle v. Bankers Life and Casualty Co., 888 F.2d 678 (10th CA, Okla., 1989); Thompson v. City of Louisville, Ky., 362 US 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960).

Likewise, the Court of Appeal's Decision, made in disregard of the plainly applicable statute law of the State, and in disregard of the controlling decision of the highest State Court, without rational excuse or justification, also deprives Petitioner of 'due process of law' in its most fundamental sense -- Brinkerhoff-Faris Trust and Savings Co. v. Hill, 50 S.Ct. 451, 281 US 673, 74 L.Ed. 1107 (1930); McNickle v. Bankers Life and Casualty Co., 888 F.2d 678 (10th CA, Okl., 1989), and impairs the 'obligation of contracts' in violation of the 'contract clause' in Article I, Section 10, of the U. S. Constitution, by arbitrarily modifying the substantive and procedural rights with reference to which Petitioner's Mortgage

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Fund, and by me and Venture Fund against the Jonathan Group, encompassed within the scope of the pending litigation.

In my understanding, the effect of this settlement, therefore, was to restore the parties to their respective positions prior to the filing of the present litigation, but without the various claims asserted in the litigation as between the Jonathan Group and Venture Fund. Thus, Venture Fund has been compensated through this settlement for its various tort claims against the Jonathan Group, and has agreed to the dismissal with prejudice of the various claims asserted by the Jonathan Group in the litigation and at the settlement conference (mediation).

Since I am not familiar with California law, as you are well aware, I do not pretend to know exactly to what extent the settlement with the Jonathan Group would prevent us from now collecting the entire balance due on our Promissory Note from the Jonathan Group, as well as Pacific Savings Bank (although I would imagine we would be limited to collecting the Note only once), nor do I know whether we have any remaining tort claims against Pacific Savings Bank, in addition to our contract claims for collection of the Promissory Note. Hence, I will await your further advice as to these matters.

In the meantime, however, I cannot (will not) sign the "Settlement Agreement and Mutual Release" submitted by the Jonathan Group's attorneys, since it departs so far from the limited scope of our actual settlement agreement, as I understand it.

Your time and attention is appreciated. I will await your further advice before taking any further action in this matter.

¶ Sincerely, ¶ /s/ William H. Breck ¶ General Partner ¶ Venture Fund I"

(Note and Deed of Trust), and the 'settlement agreement', were made, without substantial or rational justification. -- Edwards v. Kearzey, 96 US 595, 24 L.Ed. 793 (1877); Walker v. Whitehead, 83 US 314, 16 Wall. 314, 21 L.Ed. 357 (1872); Planters' Bank of Miss. v. Sharp, 47 US 301, 6 How. 301, 12 L.Ed. 447 (1848); W. B Worthen Co. ex rel. Board of Comm'rs of Street Imp. Dist. No. 513, Little Rock, Ark. v. Kavanough, 295 US 56, 55 S.Ct. 555, 79 L.Ed. 1298, 97 ALR 905 (1935); Richmond Mortgage and Loan Corp. v. Wachovia Bank and Trust Co., 300 US 124, 57 S.Ct. 338, 81 L.Ed. 552, 108 ALR 886 (1937); Shelley v. Kramer, 334 US 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948); McGhee v. Sipes, 334 US 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948); Edmonson v. Leesville Concrete Co., 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991).

Clearly the Court of Appeal's Decision is not the result of dispassionate adjudication or the rational application of laws to facts, but is instead an arbitrary exercise of judicial power and capricious deprivation of Petitioner's 'property' without substantial justification, in violation of the 'due process' clause of the 14th Amendment to the United States Constitution.-- Bandini Petroleum Co. v. Superior Court for Los Angeles Co., Cal., 284 US 8, 52 S.Ct. 103, 76 L.Ed. 136, 78 ALR 826 (1931) -- presumption invalid when entirely arbitrary, creating invidious discrimination, or depriving a party of reasonable opportunity to present defense; Tot v. U.S., 319 US 463, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943) -- presumption cannot be sustained where inference from evidentiary fact to ultimate fact is arbitrary, and without reasonable relation; Manley v. State of Georgia, 279 US 1, 49 S.Ct. 215, 73 L.Ed. 575 (1943) -- arbitrary presumption violates 'due process'; Ochoa v. Hernandez y Morales, 230 US 139, 33 S.Ct. 1033, 57 L.Ed. 1427 (1913) -- 'due process' inhibits the taking of one person's property and giving it to another by retrospective effect of change in law; Gonzales v. U.S., 348 US 407, 75 S.Ct. 409, 99 L.Ed. 467 (1955) -- notice of the issues to be determined and opportunity to be heard on those issues is the most fundamental of rights protected by the 'due process' clause of the 14th Amendment.

III. The Court of Appeal's De-Publication Order shows the Court's intent to 'discriminate' against the Non-Resident

Petitioner in violation of the 'equal protection' clause of the 14th Amendment

What makes this case worthy of consideration by the Supreme Court of the United States, however, is the fact that the Court of Appeal also ordered its Decision de-published, even though publication is required by the literal terms of the California Rules of Court, because the opinion clearly announces "a new rule of law" - CRC §976(b)(1), "of continuing public interest" - CRC §976(b)(3).

However, since the 'rule of law' applied by the Court of Appeal to deprive Petitioner of the benefit of its Mortgage (Note and Deed of Trust) would be just as devastating to the property interests of California citizens (as it is to Petitioner), and would make the negotiation 'out-of-court' settlements nearly impossible, neither the Court of Appeal nor the California Supreme Court desired this Decision to be published, since:

By de-publishing its Decision, the Court of Appeal prevents public 'notice', debate, discussion and criticism of the 'new rule of law' announced in the Court's Decision -- CRC §976(e); and

By de-publishing its Decision, the Court of Appeal prevents 'citation' of, or 'reliance' on, the 'new rule of law' in any other case or proceeding -- CRC §977(a).

Certainly, no more persuasive evidence of the Court's intented 'invidious discrimination' against the Non-Resident Petitioner can exist than the Court of Appeal's own Order, indicating that it does not desire this case to be relied upon or cited in any other case or proceedings, where it might affect the rights of California citizens. -- CRC §§ 976(e), 977(a). The California Court of Appeal for the First District, by its de-publication Order, clearly shows its intent to deprive Petitioner of 'Equal Protection' in violation of the 14th Amendment, by applying a 'special rule' to only this case.

IV. In addition, this case raises the Question: Whether the De-Publication of Judicial Decisions violates Petitioner's rights under the 'due process' clause of the 14th Amendment

The more interesting question is whether the Court of Appeal's de-publication Order also violates Petitioner's rights under the 'due process' clause of the 14th Amendment.

Although Petitioner can hardly imagine a more fundamental requirement of a 'free' society, than that the decisions of its judicial officers be publically announced and freely published, to be 'notice' to others potentially affected, and to be subject to the review, analysis, debate and criticism that has been the halmark of the English common law since the abolition of the Court of Star Chamber in 1641[103] and the only sure limit on the exercise of arbitrary power for 'private' or 'secret' purposes, Petitioner has found no case where this issue has been addressed by this Court.

On the other hand, Petitioner notes that the propensity for de-publication of judicial decisions has infected the Federal Courts as well as the Courts of the State of California.[104]

Hence, one must wonder what the future will be, if litigants do not have the absolute right to demand publication of a judicial decision that they (or any one of them) believes to be worthy of exposure to public debate and criticism.

CONCLUSION

Therefore, Petitioner requests the United States Supreme Court to grant Writ of Certiorari to the California Court of Appeal for the First District in this case, to uphold the right of Petitioner (as a Non-Resident of California) to receive a fair and impartial adjudication in the Courts of the State of California under the 'due process', 'equal protection', and 'privileges and immunities' clauses of the 14th Amendment, to restore the 'obligation' of Petitioner's Mortgage (Note and Deed of Trust) under the 'contract clause' in Article I, Section 10, and to determine the right of Petitioner under the 'due process' clause of the 14th Amendment to 'publication' of the Decision of the California Court of Appeal in this case.

Respectfully submitted.

William H. Breck, Attorney
Counsel of Record for Petitioner
1159 C Porter Street
Vallejo, CA 94590

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103 W. S. Holdsworth, A History of English Law, 13th Ed., v. 1, at p. 515.

104 Rules of the Ninth Circuit Court of Appeals, Rule 36-1 through Rule 36-6.

Document Number	APPENDIX Description	Page Number

1. Decision of the CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION FIVE -- Filed June 16, 1993 ____ A-1
2. ORDER of the Solano County Superior Court -- dated August 4, 1992 ____ A-10
3. ORDER GRANTING PLAINTIFFS' MOTION TO ENFORCE SETTLEMENT AGREEMENT DETERMINING PROMISSORY NOTE SECURED BY DEED OF TRUST VOID AND OF NO LEGAL FORCE AND EFFECT; ORDER DENYING DEFENDANTS' MOTION FOR "SANCTIONS" -- dated August 6, 1992 ____ A-12
4. ORDER DENYING DEFENDANTS' MOTION TO RECONSIDER COURT'S AUGUST 6, 1992 ORDER -- dated September 30, 1992 ____ A-15
5. NOTICE OF APPEAL -- dated September 30, 1992 ____ A-17
6. Letter under CRC 976 & 978 'Requesting Publication' of Decision of Court of Appeals -- dated June 20, 1993 ____ A-19
7. APPELLANT'S PETITION FOR REHEARING to the California Court of Appeal, First Appellate District, Division Five -- dated June 22, 1993 ____ A-25
8. Order of the COURT OF APPEAL, FIRST APPEL LATE DISTRICT, DIVISION FIVE - denying Appellant's 'Request for Publication' -- filed June 30, 1993 ____ A-47
9. Letter from the California COURT OF APPEAL transmitting Appellant's 'Request for Publication' to the California Supreme Court -- dated June 29, 1993 ____ A-48
10. Order by the COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION: 5 - denying Appellant's 'petition for rehearing' -- filed June 30, 1993 ____ A-49
11. PETITION FOR REVIEW to the California Supreme Court - dated July 26, 1993 ____ A-50
12. Order by the CALIFORNIA SUPREME COURT - IN BANK denying 'Petition For Review' and 'request for publication' of the Court of Appeal Decision -- filed September 1, 1993 _ A-87

COPY

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT - DIVISION FIVE

FILED
June 16, 1993
Court of Appeal - First App. Dist.
Ron D. Barrow
by _____

VILLAGE ON THE BAY DEVELOPMENT, et al.,
Plaintiff/Respondent,

v.

VENTURE FUND I et al.,
Defendant/Appellant.

A059207
Solano Superior Court No. 97166

_____/

Appellants Venture Fund I and William H. Breck appeal from a decision by the Solano County Superior Court ruling that a settlement agreement they executed was enforceable. Appellants claim the court's interpretation of that agreement was improper. We disagree and affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

The appeal arises out of a plan to develop a 260-unit apartment complex in Vallejo known as the Village on the Bay (the property).

Venture Fund I, an Alaskan limited partnership, owned an option to purchase the property. In May 1986, Venture Fund I, through its general partner Breck, agreed to sell the property to Village on the Bay Development, a joint venture between two entities: Pacifica Bay Village Associates, Inc. and JP Village Bay Partners. The first joint venturer, Pacifica Bay Village Associates, Inc. was allegedly a subsidiary of PSB Realty, Inc., which was itself a subsidiary of Pacific Savings Bank, Inc. The second joint venturer, JP village Bay Partners, was a limited partnership with Jonathan Group Properties, Inc. as its general partner. Jonathan Group Properties, Inc. was, in turn, a subsidiary of another entity, Jonathan Group, Inc.

For the remainder of this opinion, we will refer to Venture fund I and its general partner Breck as appellants. We will refer to the joint venture entity, Village on the Bay Development, and the remaining entities discussed above as respondents. At times, these designations will be over and under inclusive. When necessary to our analysis, we will more precisely designate the parties involved.

The contract between appellants and respondents was modified several times; and when the transaction finally closed, respondents executed a $1 million promissory note in favor of appellants as apart of the purchase price. This note was secured by a deed of trust against the property.

As the project got underway, a dispute arose when respondents claimed the right to offset certain expenses against their obligations under the note. Thus, respondents did not pay their obligation when it became due. In response, appellants initiated foreclosure proceedings. Respondents wanted to proceed with the development regardless of the dispute, so they bonded around the foreclosure by deposition $976,889.42 into an escrow account, and then disbursed $400,000 from this account to appellants as a partial payment of the note.

This procedure did not resolve the dispute; and in May 1987, respondents filed a complaint against appellants in the Solano County Superior Court seeking a declaration of their rights and obligations under the note. In response, appellants filed a cross-complaint against respondents for abuse of process and other claims.

In conjunction with their suit, respondents sought and obtained a preliminary injunction barring appellants from foreclosing on the deed of trust. At respondents' request, the court ruled that the amount remaining in the escrow account, $576,889.42, could serve as the injunction bond.

The legal action then moved into its discovery phase; and during this period, the apartment complex was apparently built. Then in May 1989, the participants in the joint venture agreed to dissolve their association. Jonathan Group, Inc. obtained

the joint venture's interest in the ongoing litigation, while Pacifica Bay Village Associates, Inc. accepted title to the property subject to all liens and encumbrances which then existed.

Shortly thereafter, appellants and respondents agreed to submit their dispute to mediation; and on June 19, 1989, after a full day of negotiations, a settlement was reached. Counsel for respondents, Amy Matthew of the firm Miller, Starr & Regalia, prepared a handwritten "Memorandum of Settlement" describing the terms of the agreement. Since the interpretation of that agreement forms the basis for the present appeal, we set forth pertinent portions at some length.

> "The parties hereto acknowledge and confirm that a settlement has been effected as of June 19, 1989 and also acknowledge that a more formal settlement agreement shall be prepared and executed by the parties hereto. With this understanding, the parties agree to the following terms:
>
> "1. The complaint filed by plaintiffs Jonathan Group, Inc, et al. against Venture Fund I and its general partner William H. Breck, ...[1] (and identified as Solano Superior Court Action No. 97166) shall be dismissed with prejudice. The cross-complaint filed by Venture Fund I and its general partner William H. Breck against Jonathan Group Inc et. al shall be dismissed with prejudice ....[2]
>
> "2. The approximate sum of $641,877.75 is held on account at Wells Fargo Bank, pursuant to the joint escrow instructions of Jonathan Group, Inc et. al and William H. Breck et. al and identified as First American Title Insurance Co. escrow No 75618;

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1 As in original.

2 Id.

"3. Venture Fund I and its general partner William H. Breck shall receive the sum of $280,000.00 from the above-referenced escrow account,

"4. The balance of said funds on deposit shall be paid to Jonathan Group, Inc.

"5. All parties hereto agree that the settlement is a complete and final settlement of all known and unknown claims arising out of Action No. 97166;

"6. This Agreement is intended to, and shall be construed as, a binding and enforceable agreement between the parties hereto[.]"[3]

Breck signed the agreement individually and on behalf of Venture Fund K, while two corporate officers, Gary L. Chase and L. Lee Kauftheil, signed on behalf of Jonathan Group, Inc. Matthew signed the agreement as "Counsel for Jonathan Group Inc et. al[.]"[4]

About a week later, respondents sent a letter to Solano County Superior Court stating the parties had reached a settlement and that the funds i the escrow account could be released. Subsequently, the court entered an order allowing the funds to be distributed.

Counsel for respondents then prepared a formal settlement agreement and distributed it to the parties for approval. About two months later, appellants' counsel sent a reply stating the agreement was being reviewed by Breck. Thereafter, in July 1990 (over one year after the initial settlement agreement had been signed), appellants' counsel sent another letter to respondents' counsel stating that Breck "had some problems with the language," but that he was so busy with other matters he had been unable to complete his review.

The entire dispute then went dormant for approximately two years. Finally, in May 1992, the Solano County Superior Court issued an order indicating it was about to dismiss the

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3 Id.

4 Id.

action because it had not been brought to trial within five years. This possibility apparently jolted the parties into action and a flurry of motions followed. Respondents moved to avoid the dismissal and asked the court to enforce the June 19, 1989, settlement agreement by ruling that all parties to the litigation were discharged under its terms. In response, appellants conceded the June 19, 1989, settlement agreement resolved all disputes between themselves on the one hand, and Jonathan Group, Inc. and its related entities (i.e., JP Village Bay Partners, Jonathan Group Properties, Inc., Kauftheil, and Chase) on the other. However, appellants claimed they retained their causes of action against Pacific Savings Bank and its related entities (i.e., Pacifica Bay Village Associates, Inc. and PSB Realty, Inc.) because those parties were not present at the June 19, 1989, mediation and never signed the settlement agreement. Appellants attempted to buttress this argument by alleging that Matthew specifically stated during the June 19, 1989, mediation that she was representing only Jonathan Properties, Inc.[5] that day and that Pacific Savings Bank was not participating. Respondents vehemently denied this latter allegation which Matthew characterized as "absolutely false."

The dispute was submitted to the court which ultimately ruled the settlement agreement effectively concluded the litigation, and that the note and deed of trust which formed the basis for the suits were no longer valid.

Subsequently, appellants filed several motions asking the court to reconsider its rulings. When all these motions were denied, appellants filed the present appeal.

II. DISCUSSION

Despite the admittedly confusing factual and procedural history of this case, the legal issue which we must resolve is relatively narrow. Appellants admit the June 19, 1989, settlement agreement resolved all disputes between themselves

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5 Sic.

and various entities related to Jonathan Group, Inc. However, they claim the trial court erred when it concluded the settlement agreement also released Pacific Savings Bank and its related entities because those parties were not present at the mediation and never signed the agreement.

Our review of this issue is governed by well settled rules. When the meaning of a writing is in dispute, "in the absence of conflicting evidence, the question is one of law, and ... the reviewing court will give the writing its own interpretation ...." (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 294, p. 305.) However, where conflicting evidence has been admitted to explain the meaning of a writing, any reasonable construction by the lower court will be upheld under the general rule of conflicting evidence. (Id. [6] at § 293, p. 304.) Here, since appellants and respondents submitted conflicting evidence interpreting the settlement agreement (i.e., whether Matthew said she was representing only Jonathan Properties, Inc. and its related entities at the mediation), we are required to give the trial court's interpretation substantial deference.

With this standard in mind, we turn to the agreement at issue. It states unequivocally that "The cross-complaint filed by Venture Fund I and its general partner William H. Breck against Jonathan Group Inc et. al shall be dismissed with prejudice," so an interpretation which holds it applicable to Pacific Savings Bank and its related entities is certainly reasonable. The language used, calling for a dismissal of the "cross-complaint ... with prejudice," suggests an intent to dismiss the entire cross-complaint, not just isolated cross-defendants. Furthermore, since the agreement states it is "a complete and final settlement of all known and unknown claims arising out of Action No. 97166," holding the agreement applicable to all parties makes sense. The manner in which the agreement was executed also supports the trial court's conclusion. Matthew signed the agreement as "Counsel for

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6 Underlining in original.

Jonathan Group Inc et. al" (emphasis added)[7]; and it is undisputed that Matthew represented all the respondents in this case, including Pacific Savings Bank and its related entities, in all legal pleadings filed in this case. An interpretation which construes this language as applying to Pacific Savings Bank and its related entities is more than reasonable.

The conduct of the parties also supports the trial court's decision. One week after the agreement was executed, Matthew prepared a formal settlement agreement which indisputably released all parties to the litigation, including Pacific Savings Bank and its related entities. When this agreement was forwarded to appellants and their counsel, neither raised any objection for over one year; and even then, the complaint was only that they had "some problems" with the language. If the formal settlement agreement did not comply with the intent of the parties at the June 19, 1989, mediation, we would expect appellants or their counsel to have raised some definite and speedy objection.

We conclude the language of the June 19, 1989, agreement, together with the conduct of the parties after it was executed, fully supports the trial court's conclusion that all parties to the litigation, including Pacific Savings Bank and its related entities, were released.

Appellants present several arguments in an attempt to evade this conclusion. First, they claim representatives acting on behalf of Jonathan Group, Inc. could not have released Pacific Savings Bank or its related entities from the litigation by signing the June 19, 1989, memorandum of settlement because after the joint venture was terminated in May 1989, neither joint venturer had the ability to bind the other. However, we do not hold that Pacific Savings Bank or its related entities were released by the actions of Jonathan Group, Inc.'s representatives. Instead, we conclude that Matthew, by

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7 As in original.

signing the agreement, effectively bound all her clients including Pacific Savings Bank and its related entities.

Next, appellants claim we cannot conclude Matthew had the authority to bind Pacific Savings Bank and its related entities because respondents never proved that Matthew had written authority to enter into a settlement agreement on their behalf. Since the settlement arguably involved an interest in real property (i.e., the deed of trust), appellants maintain written authority was required by the statute of frauds and the equal dignities rule. (See Civ. Code, § 1624.) However, these rules require a writing only when the "party to be charged" seeks to avoid an agreement; and here, the parties to be charged (appellants) clearly signed the June 19, 1989, settlement agreement. It is irrelevant, under the statute of frauds and the equal dignities rule, whether parties who admit the validity of an agreement have written authority to sign. (See Steel v. Duntley (1931) 155 Cal.App. 451, 452-453; 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 278, p. 272.)

Appellants next rely on a series of cases which imply that a stipulated settlement must be personally signed by a party to be enforceable. (See Gallo v. Getz (1988) 205 Cal.App.3d 329, 333; City of Fresno v. Maroot (1987) 189 Cal.App.3d 755, 762; Datatronic Systems Corp. v. Speron, Inc. (1986) 176 Cal.App.3d 1168, 1174-1175.) Appellants claim that, since neither Pacific Savings Bank nor its related entities signed the agreement, we cannot conclude it was enforceable as to them. We reject this argument for two reasons. First, appellants raised this issue for the first time in their reply brief and , thus, have waived the right to assert it on appeal. (9 Witkin, Cal.Procedure (3d ed. 1985) Appeal, § 496, pp. 484-485.) Second, as with the statute of frauds, we see no reason to apply this rule where, as here, the parties who have not signed the agreement admit its validity.

Next, appellants claim it is improper to interpret their failure to object to the formal settlement agreement against

them because there is no evidence respondents were prejudiced by that delay and, thus, cannot establish any sort of an estoppel. However, we do not hold that appellants are estopped from challenging the settlement agreement. Rather, we simply note that appellants' failure to object to the wording of the formal agreement for over one year was additional evidence upon which the trial court could rely when interpreting the June 19, 1989, settlement.

Finally, appellants assert it would be improper to uphold the trial court's interpretation of the settlement agreement because it would somehow reward respondents for their counsel's misrepresentations at the June 19, 1989, mediation. However, the trial court impliedly rejected appellants' claim that Matthew misrepresented her authority at the mediation when it concluded the agreement was enforceable against Pacific Savings Bank and its related entities. That conclusion is binding on us on this appeal.

The last issue which we must consider has been raised by respondents. they maintain we would impose sanctions on appellants for filing a frivolous appeal. We disagree. While we reject appellants' arguments, we are unwilling to characterize them as frivolous. Indeed, if the June 19, 1989, settlement agreement had been drafted more carefully, this entire dispute would not have arisen. Since that agreement was drafted by respondents' counsel, we are unwilling to impose sanctions in this case.

III. DISPOSITION

The judgment is affirmed.

PETERSON, P. J.

WE CONCUR:

KING, J.

HANING, J.

Village on the Bay Development v. Venture Fund I A059207"

" AMY MATTHEW (Bar No. 104683)
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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SOLANO

VILLAGE ON THE BAY DEVELOPMENT, PACIFICA BAY VILLAGE ASSOCIATES, INC., JP VILLAGE BAY PARTNERS, and JONATHAN GROUP PROPERTIES, INC., Plaintiffs, v. VENTURE FUND I, an Alaskan limited partnership, WILLIAM H. BRECK, RICHARD P. SAX, a corporation, as trustee, BISSELL & KARN, INC., a California corporation, and DOES 1 through 35, inclusive, Defendants.	No. 97166 ~~PROPOSED~~ ORDER DB

After review of plaintiffs' Opposition to Court's Motion to Dismiss for Failure to Prosecute, this Courts FINDS, DETERMINES AND ORDERS AS FOLLOWS:

1. Based upon the Stipulation Re disbursement of Funds and Order Thereon filed by the Court on June 27, 1989, all sums due and owning under and pursuant to that certain June 13, 1986 Promissory

Note executed by plaintiffs in favor of defendants VENTURE FUND I and WILLIAM H. BRECK have been satisfied in full.[1]

2. Based upon the foregoing, that certain Short Form Deed of Trust and Assignment of Rents recorded on June 17, 1986 in the Official Records of Solano County as Instrument No. 30372, is hereby void and of no further legal force and effect. Any attempt to enforce its provisions shall be determined to be void.[2]

3. This Court hereby enters this Order determining that all sums owed pursuant to the July 12, 1986 Promissory Note secured by Short form Deed of Trust and Assignment of Rents has been satisfied, hereby Orders that the foregoing action be dismissed with prejudice by plaintiffs against all defendants.[3]

Dated: ~~June~~ Aug 4, 1992.

/s/ Dennis Bunting
JUDGE OF THE SUPERIOR COURT

JOGR25827
opp1.ord

"

1 Emphasis in original.

2 Emphasis in original.

3 Emphasis in original.

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SOLANO

VILLAGE ON THE BAY DEVELOPMENT, PACIFICA BAY VILLAGE ASSOCIATES, INC., JP VILLAGE BAY PARTNERS, JONATHAN GROUP PROPERTIES, INC., Plaintiffs, v. VENTURE FUND I, an Alaskan limited partnership, WILLIAM H. BRECK, RICHARD P. SAX, a corporation, as trustee, BISSELL & KARN, INC., a California corporation, and DOES 1 through 35, inclusive, Defendants. And Related Cross-Complaint.	No. 97166 ORDER GRANTING PLAINTIFFS' MOTION TO ENFORCE SETTLEMENT AGREEMENT DETERMINING PROMISSORY NOTE SECURED BY DEED OF TRUST VOID AND OF NO LEGAL FORCE AND EFFECT; ORDER DENYING DEFENDANTS' MOTION FOR "SANCTIONS"

The Motion of plaintiffs VILLAGE ON THE BAY DEVELOPMENT, PACIFICA BAY VILLAGE ASSOCIATES, INC. JP VILLAGE BAY PARTNERS and JONATHAN GROUP PROPERTIES, INC. (hereinafter "PLAINTIFFS") seeking an Order enforcing the terms and conditions of the Settlement Agreement

effected on June 19, 1989 between plaintiffs, defendants, cross-complainants and cross-defendants in Solano County Action No. 97166 determining that all claims were fully adjudicated and resolved and the Motion of defendant and cross-complainant WILLIAM H. BRECK for Sanctions came on regularly for hearing before the Hon. Dennis Bunting on August 4, 1992, in department 3 at 8:30 a.m. No parties appearing to contest the tentative ruling of the Court and GOOD CAUSE APPEARING THEREFORE,

IT IS HEREBY ORDERED:

1. The Agreement of June 19, 1989 executed by the parties at Mediation is fully enforceable and resolves all claims arising out of the complaint and cross-complaint in the above-referenced action;

2. Based upon the Agreement of June 19, 1989 and the "Stipulation Re: Disbursement of Funds and Order Thereon" filed by this Court on June 27, 1989, all sums due and owning pursuant to that certain promissory note dated June 13, 1989 [4] (executed by Plaintiff VILLAGE ON THE BAY DEVELOPMENT in favor of defendants VENTURE FUND I, an Alaskan limited partnership and WILLIAM H. BRECK) **have been satisfied in full**; [5]

3. As a further consequence of the Agreement of June 19, 1989 and the "Stipulation Re: Disbursement of Funds and Order Thereon," that certain short form deed of trust and assignment of rents executed by plaintiff VILLAGE ON THE BAY DEVELOPMENT (and recorded on June 17, 1986 in the Official Records of the Solano county Recorder's Office as Instrument no. 30372) **is hereby declared void and of no further legal force and effect**; [6]

4. Pursuant to Civil Code section 2941, defendant WILLIAM H. BRECK, as successor-in-interest to defendant VENTURE FUND I, shall immediately deliver to Amy Matthew at the Law Offices of Miller, Starr & Regalia the original June 23, 1986 promissory note and a duly executed and notarized Deed of Reconveyance. Thereafter, the Deed of Reconveyance shall be recorded in the Official Records of Solano County Recorder's Office;

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4 Sic.

5 Emphasis in original.

6 Emphasis in original.

5. After recordation of the duly executed and notarized Deed of Reconveyance, counsel for PLAINTIFFS shall execute a Request for Dismissal with Prejudice and cause the same to be filed with the Court and served on Defendant WILLIAM H. BRECK;

6. Defendant WILLIAM H. BRECK shall cause to be filed a Request For Dismissal With Prejudice of the cross-complaint and cause the same to be filed with the Court and served on counsel for PLAINTIFFS; and

7. The Motion of defendant WILLIAM H. BRECK for sanctions is denied.

Dated: August 6, 1992. /s/ Dennis Bunting
Judge of the Superior Court "

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SOLANO

VILLAGE ON THE BAY DEVELOPMENT, PACIFICA BAY VILLAGE ASSOCIATES, INC., JP VILLAGE BAY PARTNERS, JONATHAN GROUP PROPERTIES, INC., Plaintiffs, v. VENTURE FUND I, an Alaskan limited partnership, WILLIAM H. BRECK, RICHARD P. SAX, a corporation, as trustee, BISSELL & KARN, INC., a California corporation, and DOES 1 through 35, inclusive, Defendants. And Related Cross-Complaint.	No. 97166 ORDER DENYING DEFENDANT'S MOTION TO RECONSIDER COURT'S AUGUST 6, 1992 ORDER

The motion of defendant WILLIAM H. BRECK seeking argument on reconsideration of the Court's August 6, 1992 Order and the merits of plaintiffs VILLAGE ON THE BAY DEVELOPMENT, PACIFICA BAY VILLAGE ASSOCIATES, INC., JP VILLAGE BAY PARTNERS and JONATHAN GROUP

PROPERTIES, INC.'S (hereinafter "plaintiffs") Motion to Enforce settlement Agreement, came on regularly for hearing before the Honorable Dennis Bunting on September 25, 1992 at 8:30 a.m. in Department 3 of the above-captioned court. Kenneth R. Styles of Miller, Starr & Regalia appeared on behalf of plaintiffs; William H. Breck appeared on behalf of himself. The Court having read and considered the papers filed in support of and in opposition to William H. Breck's Motion for Reconsideration, and having heard argument of counsel thereon, and good cause appearing therefore,

IT IS HEREBY ORDERED THAT:

1. WILLIAM H. BRECK's Motion for Reconsideration is denied; and

2. The Court reaffirms its original ruling issued in its August 6, 1992 Order.

Dated: September 30, 1992 /s/ Dennis Bunting
Judge of the Superior Court "

" WILLIAM H. BRECK, pro per
1159 C Porter Street
in Vallejo, CA 94590
Phone: 707-557-5311
Fax: 707-557-5312

For Defendant/Cross-Complainant/Appellant
WILLIAM H. BRECK, individually and
as General Partner of VENTURE FUND I

**SUPERIOR COURT OF THE STATE OF CALIFORNIA,
SOLANO COUNTY**

VILLAGE ON THE BAY DEVELOPMENT, et al, Plaintiffs, vs. VENTURE FUND I, an Alaska Limited Partnership; WILLIAM H. BRECK, its General Partner; et al, Defendants.	Civil No. 97166
VENTURE FUND I, an Alaska Limited Partnership, and WILLIAM H. BRECK Cross-Complainants, vs. VILLAGE ON THE BAY DEVELOPMENT, a California 'Joint Venture'; - and its 'Joint Venture' partners: (1) JONATHAN GROUP, a California partnership; THE JONATHAN GROUP, INC.; JONATHAN GROUP PROPERTIES, INC.; JP VILLAGE BAY PARTNERS, a California Limited Partnership; L. LEE KAUFTHEIL, individually; & GARY L. CHASE, individually; and (2) PACIFIC SAVINGS BANK; PSB REALTY CORPORATION; and PACIFICA BAY VILLAGE ASSOCIATES, INC.; et al; Cross-Defendants.	**NOTICE OF APPEAL** (CCP 904.1)

NOTICE OF APPEAL
(CCP 904.1)

COMES NOW WILLIAM H. BRECK, individually and as General Partner of VENTURE FUND I, and appeals to the Court of Appeals of the State of California, First Appellate District, from the following Orders of the above entitled Court:

1. **ORDER dated August 4, 1992** (a copy of which is marked **Exhibit 'A'** attached hereto and incorporated by this reference herein); and

2. **ORDER GRANTING PLAINTIFFS' MOTION TO ENFORCE SETTLEMENT AGREEMENT DETERMINING PROMISSORY NOTE SECURED BY DEED OF TRUST IS FULLY SATISFIED AND DETERMINING DEED OF TRUST VOID AND OF NO LEGAL FORCE AND EFFECT; ORDER DENYING DEFENDANTS' MOTION FOR "SANCTIONS", dated August 6, 1992** (a copy of which is marked **Exhibit 'B'** attached hereto and incorporated by this reference herein).

The ORDERS appealed are final Orders of the Superior court which purport to dispose of all matters at issue before the Superior Court herein.

A NOTICE OF ENTRY OF ORDER dated August 11, 1992, was received by BRECK on August 13, 1992.

A MOTION FOR RECONSIDERATION was filed by BRECK on August 4, 1992, and a Hearing on such Motion was granted by ORDER dated September 10, 1992.

The said MOTION FOR RECONSIDERATION was heard on September 25, 1992, and was Denied by the Court at such Hearing, without further written Order of the Court.

Dated September 29, 1992.

/s/ William H. Breck

BY: WILLIAM H. BRECK, PRO PER

Appellant

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June 20, 1993

COURT OF APPEAL FOR THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT - DIVISION FIVE
MARATHON PLAZA - SOUTH TOWER
303 SECOND STREET - SUITE 600
SAN FRANCISCO, CA 94107

Ref: Village on the Bay Development et al vs. Venture Fund I, et al
Appeal No. A 059207 - Appeal from Solano County Superior Court Case No. 97166 - Opinion & Decision of the Court of Appeals Filed June 16, 1993

Dear Sir/Madam:

THE COURT'S OPINION IN THIS CASE ANNOUNCES A NEW RULE OF LAW REGARDING THE AUTHORITY OF AN ATTORNEY TO EXECUTE FOR CLIENTS, AND TO BIND CLIENTS TO, A SETTLEMENT AGREEMENT, IN THE ABSENCE OF THE CLIENT, WITHOUT THE CLIENT'S KNOWLEDGE OR CONSENT, AND WITHOUT WRITTEN AUTHORITY FROM THE CLIENT, BASED SOLELY ON THE ATTORNEY HAVING REPRESENTED SUCH CLIENT BY FILING "PLEADINGS" IN COURT FOR THE CLIENT, AND THEREFORE SHOULD BE PUBLISHED UNDER SECS. 978 (a) AND 967 (b) OF THE CALIFORNIA RULES OF COURT.

The Opinion and Decision of the Court of Appeals in this case appears to hold that Amy Matthew, merely due to her position as a member of the law firm of Miller Starr & Regalia and one of the attorneys for PACIFICA, PSB REALTY, and PACIFIC SAVINGS BANK (in addition to her representation of the JONATHAN GROUP, INC. and its subsidiaries and affiliates, including

KAUFTHEIL and CHASE individually) in the instant litigation, had the authority to execute the "Memorandum of Settlement" on behalf of PACIFICA, PSB REALTY and PACIFIC SAVINGS BANK and its subsidiaries (all California corporations), which were otherwise not represented at the mediated settlement conference on June 19, 1989, so that the "Memorandum of Settlement" became binding on PACIFICA, PSB REALTY and PACIFIC SAVINGS BANK, if and/or when PACIFICA, PSB REALTY and PACIFIC SAVINGS BANK (through Amy Matthew) claimed to be included in such "Memorandum of Settlement".

In the language of the Court's Opinion in this case:

> " +++ we do not hold that Pacific Savings Bank or its related entities were released by the actions of Jonathan Group. Inc.'s representatives. Instead, we conclude that Matthew, by signing the agreement, effectively bound all her clients including Pacific Savings Bank and its related entities." -- Opinion filed June 16, 1993, at page 9.

This holding creates a new rule of law, so far as Appellant is aware, since it appears to be a substantial departure from the rule of the California Supreme Court in Mesler vs. Bragg Management Co., 39 Cal.3d 290, 216 Cal. Rptr. 443, 702 P.2d 601 (1985).

In Mesler vs. Bragg Management Co. the California Supreme Court dealt with a similar situation, where an attorney represented multiple Client corporations, and a 'settlement agreement' was entered into as to one of the corporate Clients, which was expressly named. The attorney then claimed that the other Client corporation was also entitled to the benefit of inclusion in the 'settlement agreement', even though the other Client corporation contributed none of the consideration for the settlement, and was not explicitly named in the 'settlement agreement'. In that case the California Supreme Court said:

> "[I]n many cases the parent and subsidiary will be represented by the same counsel, as in the situation at bar, or by separate counsel working in close collaboration. Thus the easiest method for avoiding indemnity problems is to include both corporations in the settlement. +++

+++ When, as here alleged, the terms of settlement and release expressly include only the subsidiary and no other party, the parent should not magically benefit from the agreement. +++ And, as for the protection of the corporations, the solution is simple: both parties could and should participate in the negotiations. In this way, with every party's identity fully disclosed, an agreement fair to all can be reached.

We hold that when a plaintiff in a tort action sues one party as the alter ego of another, the plaintiff is not barred from proceeding against the former after settlement with its alter ego. In the case at bar the trial court abused its discretion in refusing to allow the plaintiff to amend his pleadings for this purpose." -- Mesler vs. Bragg Management Co., 39 Cal.3d 290, 216 Cal. Rptr. 443, 702 P.2d 601 (1985).

Although Mesler vs. Bragg Management Co. involved two corporations, one of which was the alter ego of the other (instead of the one being the 'joint venturer' of the other, as in this case), Appellant believes that the rule of Mesler vs. Bragg Management would have governed on the facts of this case, except for the new rule of law forged by the Court's Opinion in this case.

The Opinion of the Court in this case seems to clearly indicate that it is not relying upon the presence of the Client corporations at the 'settlement' or on any participation of the Client corporations in the 'settlement negotiations' (as the California Supreme Court seemed to require in Mesler vs. Bragg Management). In this case the Court's Opinion directs attention specifically and only to the fact that Amy Matthew had filed "pleadings" for the Client corporation in court, and relied solely upon the fact of such representation of the Client corporations in the litigation as the basis for its conclusion that Amy Matthew had the authority to execute the 'Memorandum of Settlement' on behalf of the absent Client corporations. In the words of the Court's Opinion:

"The manner in which the agreement was executed also supports the trial court's conclusion. Matthew signed the agreement as "Counsel for Jonathan Group Inc et. al" (emphasis added [by the Court]); and it is undisputed that

Matthew represented all the respondents in this case, including Pacific Savings Bank and its related entities, **in all legal pleadings filed in this case**. [Therefore...] An interpretation which construes this language as applying to Pacific Savings Bank and its related entities is more than reasonable." -- Court's Opinion filed June 16, 1993, at p. 8 -- Emphasis **(emphasis)** Added

And, according to the apparent holding of the Court's Opinion in this case, the new rule (of authority of the attorney to bind clients by the execution of a 'settlement') applies even in the absence of written authority from the Client, since the Court's Opinion concedes that:

" + + + respondents never proved that Matthew had written authority to enter into a settlement agreement on their behalf [and because . . .] the settlement involved an interest in real property (i.e., the deed of trust), appellants maintain written authority was required by the statute of frauds and the equal dignities rule. (See Civ. Code, sec. 1624.) However, these rules require a writing only when the "party to be charged" seeks to avoid an agreement; and here, the parties to be charged (appellants) clearly signed the June 19, 1989, settlement agreement. It is irrelevant, under the statute of frauds and the equal dignities rule, whether parties who admit the validity of an agreement have written authority to sign. (See Steel vs. Duntley (1931) 115 Cal. App. 451, 452-453; 1 Witkin, Summary of Cal. Law (9th de. 1987) Contracts, sec. 278, p. 272.)" -- Court's Opinion filed June 16, 1993, at p. 9 - 10 -- Emphasis added.

And, the Court's Opinion also makes it clear that it is unnecessary for the Client corporation to sign the 'settlement agreement', in order to claim the benefits of inclusion in the settlement. In the words of the Court's Opinion:

"Appellants claim that, since neither Pacific Savings Bank nor its related entities signed the agreement, we cannot conclude it was enforceable as to them. We reject this argument + + +. ... [A]s with the statute of frauds, we see no reason to apply this rule where, as here, the parties who have

not signed the agreement admit its validity." -- Court's Opinion filed June 16, 1993, at p. 10.

In short, the Court of Appeals Opinion in this case establishes a new rule governing the behavior of attorneys and their Clients in relation to 'settlement' negotiations, and clearly states the factors that determine when a 'settlement' negotiated within the jurisdiction of the First Appellate District will be considered to be enforceable under CCP 664.6.

THE NEW RULE OF LAW REGARDING THE AUTHORITY OF AN ATTORNEY TO EXECUTE AND BIND CLIENTS TO SETTLEMENTS, WITHOUT MANY REQUIREMENTS PREVIOUSLY THOUGHT TO BE NECESSARY, IS A MATTER OF GREAT PUBLIC INTEREST AND IMPORTANCE, AND THEREFORE SHOULD BE PUBLISHED UNDER THE STANDARDS OF CRC 986 (b).

As indicated above, the Court's Opinion in this case, clearly goes substantially beyond the former bounds of Mesler vs. Bragg Management, which has been understood to be the law governing the conduct and authority of attorneys involved in potential multi-party settlements since 1985.

Hence, the Opinion of the Court of Appeals would be a matter of great interest among the many members of the California Bar who are regularly involved in litigation, and who may be frequently involved in situations involving multi-party settlement negotiations.

Clearly, those members of the bar who desire to minimize the interference and inconvenience of Client involvement in sometimes 'lengthy' settlement negotiations, would be benefited by the new extension of the rule of Mesler vs. Bragg Management which this Court has adopted in this case.

And likewise, the many members of the California Bar who represent clients who may become involved in settlement negotiations with multiple parties represented by one firm or one attorney, should be made aware as quickly as possible, by publication of the Court's Opinion and Decision in this case, of the potential dangers of negotiating and/or executing a settlement agreement with one member (or less than all) of a group of Clients represented by a single firm or individual attorney.

Therefore, Appellants urge the Court to Publish its Opinion and Decision in this case pursuant to Rule 986 of the California Rules of Court.

Sincerely,

/s/ William H. Breck

William H. Breck
Appellant Pro Per

cc: Amy Matthew, Esq.
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Clerk of the Solano County Superior Court
For Attn: Judge Bunting
Re: Civil Case No. 97166
600 Union Avenue
Fairfield, CA 94533

I hereby certify under the penalties of perjury provided by California Law that a copy of the foregoing letter was mailed on this date to each of the parties and persons named above by First Class Mail, postage prepaid.

Dated: 6/20/93 By: /s/ William H. Breck
William H. Breck

IN THE COURT OF APPEAL
FOR THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FIVE

VILLAGE ON THE BAY DEVELOPMENT, et al, Plaintiffs and Cross-Defendants, vs. VENTURE FUND I and WILLIAM H. BRECK, et al, Defendants and Cross-Claimants,	Court of Appeal Case No. A059207 Appeal from the Superior Court for Solano County Judge Dennis Bunting
VENTURE FUND I and WILLIAM H. BRECK, Appellants, vs. VILLAGE ON THE BAY DEVELOPMENT, et al, Appellees.	Superior Court Case No. 97166

APPELLANT'S PETITION FOR REHEARING

Submitted by:

WILLIAM H. BRECK, Pro Per,
Individually and as Successor in Interest and former General Partner
of
VENTURE FUND I
(an Alaska Limited Partnership
dissolved by expiration of its stated term on December 31, 1991)

Dated: 6/22/93

/s/ William H. Breck

WILLIAM H. BRECK
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Accepted for Filing in the Office of the Court of Appeals for the State of California, First Appellate District, Division Five, on this _____ day of _____, 1993.

By:_____ _____Clerk of the Court

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JURISDICTIONAL STATEMENT

This Petition for Rehearing is hereby submitted on behalf of Appellant within 15 days after the date the Opinion and Decision of the Court of Appeals was filed herein, on June 16, 1993, as required by California Rules of Court 27 (b).

PETITION FOR REHEARING

Appellant BRECK requests the Court to grant Rehearing on the Principal Issue of whether an Attorney who represents a Client corporation in litigation (i.e., by the filing of "legal pleadings" in Court) thereby acquires the authority ('actual' or 'implied' or 'apparent') to bind the Client corporation by the Attorney's execution of an out of court 'Settlement Agreement', under CCP 664.6, CCP 877 and Corp. Code 313.

THE COURT SHOULD GRANT A REHEARING BECAUSE :

THE RULE OF LAW ANNOUNCED IN THE OPINION IN THIS CASE APPEARS TO BE CONTRARY TO THE DECISION OF THE CALIFORNIA SUPREME COURT IN MESLER VS. BRAGG MANAGEMENT CO., 39 Cal.3d 290, 216 Cal. Rptr. 443, 702 P.2d 601 (1985)

In the language of the Court's Opinion in this case: —

> " +++ we do not hold that Pacific Savings Bank or its related entities were released by the actions of Jonathan Group. Inc.'s representatives. Instead, we conclude that Matthew, by signing the agreement, effectively bound all her clients including Pacific Savings Bank and its related entities." -- Opinion filed June 16, 1993, at page 9.

This holding creates a new rule of law, so far as Appellant is aware, since it appears to be a substantial departure from the rule of the California Supreme Court in Mesler vs. Bragg Management Co., 39 Cal.3d 290, 216 Cal. Rptr. 443, 702 P.2d 601 (1985).

In Mesler vs. Bragg Management Co. the California Supreme Court dealt with a similar situation, where an attorney represented multiple Client corporations, and a 'settlement agreement' was entered into as to one of the corporate Clients, which was expressly named. The attorney then claimed that the other Client corporation was also entitled to the benefit of inclusion in the 'settlement

agreement', eventhough the other Client corporation contributed none of the consideration for the settlement, and was not explicitly named in the 'settlement agreement'.

In that case the California Supreme Court said:

> "[I]n many cases the parent and subsidiary will be represented by the same counsel, as in the situation at bar, or by separate counsel working in close collaboration. Thus the easiest method for avoiding indemnity problems is to include both corporations in the settlement. + + +
>
> +++ When, as here alleged, the terms of settlement and release expressly include only the subsidiary and no other party, the parent should not magically benefit from the agreement. +++ And, as for the protection of the corporations, the solution is simple: both parties could and should participate in the negotiations. In this way, with every party's identity fully disclosed, an agreement fair to all can be reached.
>
> We hold that when a plaintiff in a tort action sues one party as the alter ego of another, the plaintiff is not barred from proceeding against the former after settlement with its alter ego. In the case at bar the trial court abused its discretion in refusing to allow the plaintiff to amend his pleadings for this purpose." -- Mesler vs. Bragg Management Co., 39 Cal.3d 290, 216 Cal. Rptr. 443, 702 P.2d 601 (1985)

Although Mesler vs. Bragg Management Co. involved two corporations, one of which was the alter ego of the other (instead of the one being the 'joint venturer' of the other, as in this case), Appellant believes that the rule of Mesler vs. Bragg Management should be held to govern in this case, and that the rule of Mesler vs. Bragg Management prohibits reliance upon the signature of the attorney alone, to bind a Client corporation to or to include a Client corporation in a Settlement Agreement:

(1) since the Attorney offered no evidence to support the Attorney's claim that (and the Court cites no evidence that) the Client had knowledge of or concurred in the 'Memorandum of Settlement';

(2) since the Court acknowledges in its Opinion (at p. 8) that the Name of the Client does not appear in the 'Memorandum of Settlement';

(3) since the Court acknowledges in its Opinion (at p. 9) that there is no specific reference to the Client corporation's Property (or to the encumbrance on the Client corporation's Property) in the 'Memorandum of Settlement';

(4) since the Court acknowledges in its Opinion (at p. 9) that the Client was not present during the negotiation of the terms of the settlement;

(5) since the Court acknowledges in its Opinion (at p. 9-10) that the Client was not present when the Attorney signed the 'Memorandum of Settlement';

(6) since the Court acknowledges in its Opinion (at p. 9-10) that the Client corporation did not execute the 'Memorandum of Settlement' through any executive officer; and

(7) since the Court acknowledges in its Opinion (at p. 9-10) that the Attorney did not have written authority to execute the 'Memorandum of Settlement' from any of the non-signing Client corporations.

Also see Folsom vs. Butte County Ass'n of Governments, 32 Cal.3d 668, 186 Cal.Rptr. 589, 652 P.2d 437 (1982) -- settlement agreements have binding effect only on the parties thereto.

Appellant submits that the rule announced in the Opinion of the Court is inconsistent with and/or violative of the principles announced by the California Supreme Court in Mesler vs. Bragg Management Co. (supra), and Folsom vs. Butte County Ass'n of Governments (supra), and therefore a rehearing should be granted in this case to permit consideration of the inconsistencies between the Opinion of the Court and the Rulings of the California Supreme Court.

THE COURT SHOULD GRANT A REHEARING BECAUSE :

THE RULE OF LAW ANNOUNCED IN THE OPINION IN THIS CASE IS NOT IN ACCORD WITH THE APPLICABLE CALIFORNIA STATUTE LAW

Code of Civil Procedure Sec. 664.6 explicitly requires that:

> "[a Settlement Agreement must be] in writing [if not made] orally before the court [in order to be enforceable]" -- Emphasis Added.

Code of Civil Procedure Sec. 877 explicitly states that:

> "a release [or a Settlement Agreement] ... given in good faith ... to one of a number of tortfeasors claimed to be liable for the same tort, or to one or more other co-obligors mutually subject to contribution rights, shall not discharge any other party from liability unless its terms so provide [but merely gives the other parties an offset for the settlement amount]."

Civil Code Sec. 1543 specifically states:

> "[a] release of one or more joint debtors does not extinguish the obligations of any of the others, unless they are mere guarantors ..." -- Emphasis Added

Civil Code Sec. 2309 specifically states:

> "[the] authority to enter into a contract required by law to be in writing can only be given by an instrument in writing." -- Emphasis Added

And Corporations Code Sec. 313 specifically states:

> " ... any ... instrument in writing, and any assignment or endorsement thereof, executed or entered into between any corporation and any other person, [may be "invalidated as to the corporation by ... lack of authority of the signing officers" unless] signed by the chairman of the board, the president of any vice president and the secretary, any assistant secretary, the chief financial officer or any assistant treasurer of such corporation" -- Emphasis Added

And sections 1636 and 1646 of the California Civil Code clearly require that the interpretation given to the 'Memorandum of Settlement' contract in this case must be in accord with the California Statute Law:

> "A contract is to be interpreted according to the law ... of the place where it is to be performed; or, ... according to the law

... of the place where made." -- Emphasis Added -- Civil Code Section 1646

And Civil Code Section 1636 prohibits special rules for particular kinds of contracts:

"All contracts, whether public or private, are to be interpreted by the same rules, except as otherwise provided by this Code." -- Emphasis Added

Appellant submits that the rule announced in the Opinion of the Court is inconsistent with and/or violative of several of these provisions of the California Statute Laws, and therefore a rehearing should be granted in this case to permit consideration of the inconsistencies between the Opinion of the Court and the California Statutory Law.

THE COURT SHOULD GRANT A REHEARING BECAUSE : THE ISSUE ADDRESSED AND THE RULE OF LAW ANNOUNCED IN THE COURT'S OPINION WAS NOT ADDRESSED IN THE BRIEFS FILED IN THIS CASE

The Issue of whether Amy Matthew had individual authority (as the attorney representing the corporations in the litigation) to sign for and on behalf of her absent Client corporations was not addressed in either of the Briefs submitted by Appellant, or in the Respondent's Brief.

Respondents never claimed that Amy Mathew was a corporate officer of PACIFIC SAVINGS BANK, or any of its affiliates, represented by Miller Starr & Regalia, or that Amy Matthew (or Miller Starr & Regalia) had either written or other express authority, so that there was no Issue, known to Appellant, regarding Amy Matthew's authority.

Respondents never claimed that Amy Matthew, merely as the attorney for the corporations had the authority (which the Court's Opinion appears to 'vest' in her) to execute the 'Memorandum of Settlement' for the absent Client corporations, merely because:

"... it is undisputed that Matthew represented all the respondents in this case, including Pacific Savings Bank and its related entities, in all legal pleadings filed in this case." -- Court's Opinion at page 8. -- Emphasis Added.

And, Respondents never cited any statutory provision, prior decision, or other authority suggesting that a California Attorney, merely by representing a Client corporation in litigation, becomes 'authorized' or 'empowered' (1) to negotiate a settlement agreement for a Client Corporation, (2) to execute a 'settlement agreement' on behalf of such Client Corporation, and (3) to bind such Client Corporation to such 'settlement agreement' -- under circumstances such as in this case, i.e.:

(1) in the absence of all officers and directors of the Client corporation;

(2) without the knowledge of any officer or director of the Client corporation;

(3) without any delegation of authority from any officer (or from the board of directors) of the Client corporation;

(4) without any written instruction or authorization from any normally authorized officer of the Client corporation (under Cal. Corporations Code sec. 313) to sign for, and on behalf of, the Client corporation;

(5) without any evidence that the attorney was instructed or authorized in any manner to sign in lieu of, instead of, as a dispensing with, and elimination of, or replacement for, the requirement of signature by a normally authorized officer of the Client corporation; and

(6) without expressly naming the Client corporation for which the Attorney claims to act.

Appellant submits that the rule announced in the Opinion of the Court is a new rule of law, on an issue not addressed by Appellant or Respondent in their Briefs filed in this case, and therefore a rehearing should be granted in this case to permit the parties to brief and argue the merits of the issue and new rule of law announced in the Opinion of the Court. -- See In re Jessup, 81 Cal. 408, 471, 22 Pac. 742 (1899); and California Practice Guide - Civil Appeals and Writs (1991) at sec. 12.16 (Omission or Misstatement of Issue or Fact), sec. 12.19 (Mistake of Law), and 12.20 (Decision Based on Unbriefed Issue).

THE COURT SHOULD GRANT A REHEARING BECAUSE :

THE REQUIREMENT OF WRITTEN AUTHORITY TO EXECUTE THE MEMORANDUM OF SETTLEMENT WAS NOT "RAISED...FOR THE FIRST TIME IN [APPELLANT'S] REPLY BRIEF"

The requirement of written authority to the individuals present at the settlement mediation execute the 'Memorandum of Settlement' on behalf of the corporations was initially addressed in Appellants' Opening Brief at pages 27 - 28, where the Appellant cited the lead cases of Mesler vs. Bragg Management Co., 39 Cal.3d 290, 216 Cal. Rptr. 443, 702 P.2d 601 (1985) and Folsom vs. Butte County Ass'n of Govts., 32 Cal.3d 668, 186 Cal.Rptr. 589, 652 P.2d 437 (1982), and quoted at length from Mesler vs. Bragg Management Co., supra.

The cases referred to at page 10 of the Court's Opinion, merely interpret and further clarify the requirement of written authority first addressed in Appellant's Opening Brief, in response to the statement in Respondent's Brief (at page 12) that Miller Starr & Regalia always represented all of the Respondents in this case.

Therefore, the Court should grant a rehearing in this case to consider the requirement that any person (other than the corporate officers specifically listed in sec. 313 of the California Corporate Code) who executes a 'settlement agreement' (required to be 'in writing' by CCP 664.6, if not made 'orally before the court') on behalf of a corporation, is required (by Civil Code 2309) to have written evidence of authority to bind the corporation by his/her signature.

THE COURT SHOULD GRANT A REHEARING BECAUSE :

THERE IS NO CONFLICT IN THE EVIDENCE SUFFICIENT TO PERMIT OR REQUIRE DEFERENCE TO THE RULING OF THE TRIAL COURT IN THIS CASE

The Court's Opinion at page 7, states:

> "+ + + Here, since appellants and respondents submitted conflicting evidence interpreting the settlement agreement (i.e., whether Matthew said she was representing only Jonathan Properties, Inc. and its related entities at the

mediation), we are required to give the trial court's interpretation substantial deference." -- Emphasis Added.

The only conflict in the 'evidence' cited by the Court for its decision to defer to the Trial Court's ruling, is the statement made in Breck's Declaration (Doc #17 in Appellant's Appendix - Vol. II, at p.271):

> "9. That Amy Mathew was asked a direct question by the Mediator at the beginning of the Settlement Conference +++, and stated in response that 'PACIFIC SAVNGS BANK was not present or represented at the Settlement Conference', that they ('Amy Matthew and her associate) represented the Jonathan Group' (referring to KAUFTHEIL and CHASE, who were seated beside her), and were 'not authorized to represent the PACIFIC SAVINGS BANK at the Settlement Conference'."

In Amy Matthew's Declaration (Doc #22 in Appellant's Appendix - Vol III, at p. 637), Amy Matthew states:

> "2. I have reviewed the Declaration WILLIAM H. BRECK ('BRECK') filed in support of his alleged 'Motion for Sanctions'. His hearsay statements concerning my lack of authority to represent all of the plaintiffs are blatantly false.
>
> 3. At all times during this litigation, Miller, Starr & Regalia has represented all of the plaintiffs in this action, including both partners to the joint venture. This representation began upon initiation of the Complaint, the issuance of the Temporary Restraining Order and the Order granting preliminary injunction. Miller Starr & Regalia continued to represent all plaintiffs through the settlement, and the distribution of the assets in the escrow account. Indeed, the Court's record confirm this firm's representation of both partners to the joint venture, (see Order Granting Preliminary Injunction, Stipulation for Disbursement of Funds and Order Thereon)."

However, **these two statements** (by Breck and by Matthew) **are not in conflict**, since **they are addressing different types of authority**.

Breck's Declaration purports to state what Amy Matthew said to the Mediator regarding the persons present at the settlement conference and their authority to act for their respective corporations (i.e., in the sense that a corporate officer represents his/her corporate employer under Cal. Corporations Code Sec. 313), not in the sense that an attorney represents a client in litigation. Indeed, as the Court noted in its Opinion (at page 8),[1] Breck has never disputed that Miller Starr & Regalia (or Amy Matthew, as a member of that law firm) represent all of the Respondents as their attorneys of record in this litigation.

Matthew's Declaration, on the other hand, denies only that Miller Starr & Regalia (and Amy Matthew, as a member of that law firm) ever disclaimed the representation of all of Respondents, as the attorneys of record in this litigation. Amy Matthew's Declaration does not state her version of what she said at the settlement mediation, or deny that she made a statement at the settlement mediation (similar to the statement attributed to her by Breck) regarding the representation of the corporations by the persons present (in their capacity as corporate officers).

Although the language is somewhat similar, the Declarations of Breck and Matthew clearly address different kinds of 'representation'.

Moreover, the Court has acknowledged that none of the persons present at the settlement conference purported to represent the Pacific Savings Bank, or its subsidiaries (as corporate officers),[2] and Respondents do not claim otherwise.

And, the Court has recognized that the statement in Breck's Declaration (quoted above) does not deny that Miller Starr & Regalia (and Amy Matthew, as a member of that law firm) represented all of

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1 "+++ it is undisputed that Matthew represented all the respondents in this case, including Pacific Savings Bank and its related entities, in all legal pleadings filed in this case." -- Court's Opinion Filed June 16, 1993, at page 8.

2 "Appellants claim that, since neither Pacific Saving Bank nor its related entities signed the agreement, we cannot conclude it was enforceable as to them. We reject this argument... ... [W]e see no reason to apply this rule where, as here, the parties who have not signed the agreement admit its validity." -- Court's Opinion filed June 16, 1993, at page 10.

the Respondent corporations as the attorneys for Respondents throughout this litigation.[3]

Therefore, the 'conflicting evidence' upon which the Court relied for the determination that it was bound to give "substantial deference" to the interpretation of the Trial Court is not in conflict, in fact, and the Court should grant rehearing in this case in order to address the interpretation under the correct standard of review:

> "when the meaning of a writing is in dispute, 'in the absence of conflicting evidence, the question is one of law, and . . . the reviewing court will give the writing its own independent interpretation . . . ." -- Court's Opinion filed June 16, 1993, at page 7.

THE COURT SHOULD GRANT A REHEARING BECAUSE : THE COURT OVERLOOKED KEY EVIDENCE RELEVANT TO THE ISSUE OF THE CONDUCT OF THE PARTIES AFTER [THE 'MEMORANDUM OF SETTLEMENT'] WAS EXECUTED

The Court's Opinion states:

> "We conclude that the language of the June 19, 1989, agreement, together with the conduct of the parties after it was executed, fully supports the trial court's conclusion that all parties to the litigation, including Pacific Savings Bank and its related entities, were released." -- Court's Opinion filed June 16, 1993, at page 9.

The only "conduct of the parties" cited in the Court's Opinion, however, is:

> " . . . appellants' failure to object to the wording of the formal agreement for over one year . . ." -- Court's Opinion filed June 16, 1993, at page 11.[4]

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3 see footnote # 1, supra.

4 In the Court's statement of the "Factual and Procedural Background" at page 5, the Court makes a somewhat more extensive reference to the "appellant's failure to object", where the Court states:

> "Counsel for respondents then prepared a formal settlement agreement and distributed it to the parties for approval. About two months later, appellants' counsel sent a reply stating the agreement was being reviewed

Appellants believe, however, that the Court has overlooked **vital** evidence in the record, that has led the Court to '**misstate**' the facts relating to the "conduct of the parties" after the execution of the 'Memorandum of Settlement' dated June 19, 1989.

The first event occurring after the signing of the 'Memorandum of Settlement' on June 19, 1989, was the preparation of the 'Stipulation Re Disbursement of Funds' by Respondents' attorneys, Miller Starr & Regalia.[5] The 'Stipulation Re Disbursement of Funds' was executed by all parties except Miller Starr & Regalia on or about June 21-23, 1989.[6]

The next event was the transmittal of the 'Stipulation Re Disbursement of Funds' to the Court to approve releasing the funds posted as 'Cash Bond' on the Preliminary Injunction pursuant to CCP 529,[7] which occurred on or about June 26, 1989. And, after the Court approved the release of funds, on June 27, 1989 [8] (but without the Court seeing or approving the 'Memorandum of Settlement'), the payments were made to Venture Fund/Breck and to

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by Breck. Thereafter, in July 1990 (over one year after the initial settlement agreement had been signed), appellants' counsel sent another letter to respondents' counsel stating that Breck 'had some problems with the language', but that he was so busy with other matters he had unable (sic.) to complete his review." -- Court's Opinion filed June 16, 1993, at page 5.

5 Although Respondents have cited this 'Stipulation Re Disbursement of Funds' as an indication of the continued representation by Miller Starr & Regalia (as attorneys in the litigation) of all of the Respondents, the 'Stipulation Re disbursement of Funds' was actually executed by Mr. Ed Regalia (of Miller Starr & Regalia) only as "Attorney for Jonathan Group, Inc." Hence, it appears that Mr. Regalia is able to distinguish between the continued representation of all of the Respondents in the general litigation, and the representation of only one (or less than all) of the Respondents in relation to a particular transaction in the general course of the litigation.

6 Doc #10 in Appellant's Appendix - Vol I at page 191.

7 Appellants objected in the Trial Court to the use as evidence of the Transmittal Letter from Miller Starr & Regalia to the Trial Court, because it is self-serving hearsay, it is an ex-parte communication from counsel to the court, and it was not served on Appellants. Appellants note that the Court of Appeals Opinion does not rely upon the contents of the letter, however, and merely refers to the fact of its 'issuance'; a factual reference not prohibited by the Hearsay Rule.

8 The ORDER is Doc #11 in Appellants' Appendix - Vol I at page 193.

the Jonathan Group in accordance with the June 19, 1989 Memorandum of Settlement, by checks dated June 28, 1989.[9]

Only after all of these acts had been completed, did Amy Matthew circulate her draft proposal of the so-called 'formal settlement agreement',[10] which was subsequently forwarded to Breck in Alaska, to which State he had returned shortly after the Settlement Conference.[11]

Breck reviewed Amy Matthew's proposed draft, and objected to Appellants' Attorney Douglas,[12] and confirmed his objections with a written letter from Breck to Douglas, dated August 1, 1989.[13]

No subsequent communications between Appellants Attorney (Douglas) and Respondents' Attorneys (Miller Starr & Regalia) appear in the record, until the letter to Amy Matthew (of Miller Starr & Regalia) from Appellants' Attorney (Douglas) dated July 27, 1990,[14] indicating that Breck "had some problems with the language" (referenced in the Court's Opinion filed June 16, 1993, at page 5).

Although it is not clear on the Record what telephone conversations or other discussions might have occurred between the Appellants' and Respondents' counsel, Appellants submit that the Court must consider the absence of any change in circumstances by Respondents together with the absence of any detrimental reliance, as an indication that both litigants were willing to maintain the status quo during the intervening time.

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9 Check Nos. 1165 and 1167 are attached to Exhibit K to Doc #17 in Appellants' Appendix - Vol II at page 505.

10 Although the Proposed Draft of Amy Matthew's Settlement Agreement was purportedly transmitted to Douglas via letter dated June 26, 1989, there is no evidence in the record as to whether such letter was actually mailed on that date or the next day, and in either event it would not have been received in the normal course of the mails until two or three days later.

11 See Breck's Declaration, para. 20 - Doc #17 in Appellant's Appendix - Vol II at page 277.

12 See Breck's Declaration, para. 21 - Doc #17 in Appellant's Appendix - Vol II at pages 277-278.

13 Attached as Exhibit C to Doc #25 in Appellant's Appendix - Vol III at page 719.

14 Included in Exhibit 8 to Doc #15 in Appellant's Appendix - Vol I at page 234-34.

Thus, Douglas' letter dated July 27, 1990, indicating that Breck had "problems" with the language of Amy Matthew's proposed draft, can hardly be taken as 'concurrence', or 'silent assent', such as the Court's Opinion appears to imply.[15]

And, Breck's strongly worded letter of August 1, 1989 (less than six (6) weeks after the June 19, 1989 'Memorandum of Settlement') and hardly more than One (1) Month after Breck would have received Amy Matthew's proposed draft 'formal settlement' agreement, is clearly the "definite and speedy objection" that the Court says "we would expect [from] appellants or their counsel" (and which the Court appears to have overlooked in the Record).[16]

And, it is also not surprising that the litigation was not further pursued by Appellants, in view of the uncertainties created by the insolvency seizure of the Pacific Savings Bank and the impounding of its assets and property on October 13, 1989, by the Federal Government acting through the then newly created Resolution Trust Corporation.[17] (See Statement From the California Division of Savings and Loans attached as Exhibit F to Doc # 25 in Appellant's Appendix - Vol III at pages 725 - 727.)[18]

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15 "When [Matthew's proposed draft of 'formal settlement agreement'] was forwarded to appellants and their counsel, neither raised any objection for over one year; and even then, the complaint was only that they had 'some problems' with the language. If the formal settlement agreement did not comply with the intent of the parties at the June 19, 1989, mediation, we would expect appellants or their counsel to have raised some definite and speedy objection." -- Court's Opinion filed June 16, 1993, at page 8.

16 Breck's letter to Douglas dated August 1, 1989, appears as Exhibit C to Doc #25 in Appellants' Appendix - Vol III at page 719.

17 Indeed, in view of the well known priority accorded to 'Depositors' of failed Banks (by the FDIC), it is at least doubtful if any general creditor claim (not reduced to judgment before the 'seizure' of the Pacific Savings Bank by the Resolution Trust Corporation) would be worth pursuing to judgment after the Bank was closed by the Federal Government due to insolvency.

18 Also note that Breck did continue to assert Appellants' interest in the Bay Village Real Property in negotiations with the Resolution Trust Corporation, after the 'seizure' of the Pacific Savings Bank (see Doc # 17, paras. 24 - 31; and Exhibits N, O, Q & R to Doc #17 in Appellants' Appendix - Vol II at pages 279 - 282, and p. 529, 530, 548, & 551, respectivelly) up to the time that First

Hence, the statement in the Court's Opinion filed June 16, 1993, draws an incorrect inference due to an apparent overlooking of evidence of intervening events which appear in the documents contained in the Record. And therefore, the Court should grant a rehearing in this case in order to reconsider the Court's Opinion in view of significant evidence that was overlooked in its initial consideration of this case.

THE COURT SHOULD GRANT A REHEARING BECAUSE : THE COURT'S OPINION OVERLOOKS THE SIGNIFICANT LIMITATIONS IMPOSED ON ENFORCABLILITY OF THE 'MEMORANDUM OF SETTLEMENT' BY THE STATUTE OF FRAUDS AND THE EQUAL DIGNITIES RULE

The Court's Opinion filed June 16, 1993 disposes of the Appellants' arguments based on the Statute of Frauds (Civil Code 1624) and the Equal Dignities Rule (Civil Code 2309) with the statement:

> "However, these rules require a writing only when the 'party to be charged' seeks to avoid an agreement; and here, the parties to be charged (appellants) clearly signed the June 19, 1989, settlement agreement." -- Court's Opinion filed June 16, 1993, at pages 9-10.

And, in the next paragraph of the Court's Opinion:

> "Appellants next rely on a series of cases which imply that a stipulated settlement must be personally signed by a party to be enforceable. [citations omitted]. Appellants claim that since neither Pacific Savings Bank nor its related entities signed the agreement, we cannot conclude it was enforceable as to them. We reject this argument + + +. + + + [A]s with the statute of frauds, we see no reason to apply this rule where, as here, the parties who have not signed the agreement admit its validity." -- Court's Opinion filed June 16, 1993, at page 10.

American Title requested Respondents' counsel to reactivate this litigation (see Exhibit W to Doc #17 in Appellants' Appendix - Vol II at pages 608 - 609).

Thus, the Court has missed the thrust of Appellants' arguments regarding the application of the Statute of Frauds and the Equal Dignities Rule in this case.

Since the Appellants clearly signed the 'Memorandum of Settlement' and Respondents (PACIFICA, Pacific Savings Bank and PSB Realty) clearly did not sign the 'Memorandum of Settlement', the Statute of Frauds and Equal Dignities Rules must be applied from both directions.

THE STATUTE OF FRAUDS PREVENTS ENFORCEMENT AGAINST APPELLANTS

As to Appellants, the Equal Dignities Rule does not apply, because the Appellants signed the 'Memorandum of Settlement', but the Statute of Frauds prevents the Respondents from relying solely on the 'Memorandum of Settlement' for their claim that Appellants thereby agreed to re-convey or release Appellants' mortgage interest in the Bay Village Real Property.

The Statute of Frauds requires that all of the essential terms of an agreement to convey or transfer an interest in Real Property be included in a 'written memorandum' of the agreement, which is signed by the party to be charged. See -- Civil Code 1624 and cases cited in Appellants' Opening Brief. In this case the only 'written memorandum' is the 'Memorandum of Settlement'.

In the 'Memorandum of Settlement': **(1)** There is no mention of or reference to the Real Property; **(2)** There is no mention of or reference to the Name of the Owner of the Real Property (i.e., PACIFICA, on June 19, 1989, the settlement date); **(3)** There is no mention of or reference to the NOTE or DEED OF TRUST, which is the 'interest in Real Property' held by Appellants on the June 19, 1989 settlement date; **(4)** There is no mention of or reference to an intent to satisfy the Respondents' mortgage debt to Appellants; **(5)** There is no mention of or reference to any intent to convey or release the Appellants mortgage lien on the Real Property; **(6)** There is no consideration passing to Appellants from the then Owner of the Real Property (i.e., PACIFICA and its affiliates); And, (as the Court's Opinion acknowledges),[19] **(7)** the then Owners of the Real Property

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19 Footnotes 20 and 21 infra.

(i.e., PACIFICA and its parent corporations, PSB Realty and Pacific Savings Bank) were not in attendance at the settlement conference,[20] and did not sign the 'Memorandum of Settlement'.[21]

All of these are 'essential terms' that are missing from the 'Memorandum of Settlement' (and also missing from the 'Stipulation Re Disbursement of Funds'). And, these are the only two documents which were 'signed' by the Appellants. Hence, all of the essential terms must be contained within these two (2) documents, before the Respondents are entitled to 'enforce' this Settlement, in a way that deprives Appellants of their interest in the Bay Village Real Property.

THE EQUAL DIGNITIES RULE PREVENTS ENFORCEMENT AGAINST RESPONDENTS

As to Respondents, on the other hand, the Equal Dignities Rule prevents the Appellants from enforcing the settlement made with the Jonathan Group affiliates on June 19, 1989, as to the corporations which were not represented at the settlement conference by an executive officer. (Corporations Code 313).

Unless authority to execute the 'Memorandum of Settlement' on behalf of the absent corporation was delegated by the corporation's Board of Directors to one of the persons present, by an 'instrument in writing' (as required by the Equal Dignities Rule in Civil Code 2309, by virtue of the requirement of CCP 664.6 that stipulated settlements be made "in writing" if not made on the record "orally before the court"), the Settlement Agreement cannot be enforce by Appellants against the absent Respondent corporations (i.e., PACIFICA, and its parents, PSB Realty and Pacific Savings Bank). Also cf: Mesler vs. Bragg Management Co., (supra); Folsom vs. Butte County Ass'n of Govts., (supra); and other authorities cited in Appellants Briefs herein.

For the Appellants' Attorney (Mr. James E. Douglas) to have approved, endorsed and executed a Settlement which his clients could not enforce would be clear malpractice. Such an intent should not be lightly imputed to any attorney by the court.

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20 Court's Opinion filed June 16, 1993 at page 9.

21 Court's Opinion filed June 16, 1993 at page 10.

Therefore, since it seems plain that the Court did not address the significant considerations involved in the Appellants Statute of Frauds and Equal Dignities Rule arguments.

Hence, the Court should grant a rehearing in this case in order to reconsider the applicability of the Statute of Frauds and the Equal Dignities Rules to the 'Memorandum of Settlement' in this case, from both the Appellants' and the Respondents' perspectives.

AND,

THE COURT SHOULD GRANT A REHEARING BECAUSE :

THE MEANING ATTRIBUTED TO THE PHRASE "ET AL" VIOLATES THE COMMON LAW RULES OF 'EJUSDEM GENERIS' and 'EXPRESIO UNIS EXCLUSIO ALTERUS'

The only language contained in the 'Memorandum of Settlement', which the Court's Opinion filed June 16, 1993, suggests as indicative of an intention by Amy Matthew to execute the 'Memorandum of Settlement' on behalf of her absent corporate Clients, is the phrase "et al", which appears after Amy Matthew's signature, as "Counsel for Jonathan Group, Inc. et al".

The phrase, literally translated means, "and others".[22] And the obvious question, is which others ?

The common law rule of 'Ejusdem Generis' expresses the common sense rule that words of continuation indicate other things of the same type or class. -- See generally CJS Words and Phrases - 'Ejusdem Generis'.

In this case, the obvious reference is to the other persons who actually attended the settlement conference (i.e., KAUFTHEIL and CHASE), who were also represented by the law firm of Miller Starr & Regalia, and by Amy Matthew as an attorney with that firm.

In addition, it might be argued (with some appeal to logic and fairness) that Amy Matthew also intended to include the subsidiary corporations of JONATHAN GROUP, INC. within the scope of the 'Memorandum of Settlement', since they had were part of the same ownership group, and had the same executive officers, as

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22 Websters Encyclopedic Unabridged Dictionary of the English Language, 1989.

JONATHAN GROUP, INC. (who were present at the settlement conference), and therefore such subsidiary entities might conceivably also be included within the meaning of "et al".

However, to stretch the meaning of "et al" to include other Client corporations of Miller Starr & Regalia, who did not send an executive officer to the settlement conference, and who could not (in the absence of an executive officer, or other officer authorized in writing) enter into a mutually binding and enforceable settlement agreement, violates the spirit as well as the meaning of the common law rule of 'Ejusdem Generis', as well as common sense.

In addition, the common law rule of 'Expresio Unis Exclusio Alterus' states the common sense rule that the 'inclusion of one' (type or class of thing) implies the 'exclusion of others'. -- See generally CJS - Words and Phrases, 'Expresio Unis Exclusio Alterus'.

In this case, the inclusion of the class of entities owned and controlled by Kauftheil and Chase would made sense. That would include Jonathan Group, Inc. (mentioned specifically) and its subsidiaries and affiliates (in the same ownership group), but would not include corporations, partnerships, trusts and other entities in which neither Kauftheil, Chase nor Jonathan Group, Inc. had any ownership interest.

Hence, Appellant submits that the Court should grant a rehearing to reconsider the interpretation of the phrase "et al", appearing in the 'Memorandum of Settlement' in accordance with the common law/common sense rules of 'Ejusdem Generis' and 'Expresio Unis Exclusio Alterus'.

CONCLUSION

Although each of the issues addressed in this Petition for Rehearing require further consideration by the Court in view of the matters discussed herein, the most serious and far-reaching issue addressed, pertains to the new rule of Attorney "authority" announced in the Court's Opinion, and for which Appellants particularly request this Court to grant a rehearing, and reconsideration.

That Issue, simply stated, is:

Does an Attorney, by representing a Client corporation in litigation (i.e., by the filing of "legal pleadings" in Court on behalf of such corporate Client) thereby acquire 'actual' or 'implied' authority to thereafter execute a binding 'Settlement Agreement' on behalf of such Client corporation, under Code of Civil Procedure 664.6, & 877, Corporations Code 313, and Civil Code 2309 ?

A Rehearing is particularly appropriate and compelling due to the potential far reaching effects of such New Rule of Attorney Authority, its apparent conflict with the Decisions of other Appellate Districts, and its apparent inconsistency with various California Statutory provisions and prior Decisions of the California Supreme Court.

RESPECTFULLY SUBMITTED this 22 day of June, 1993.

by /s/ William H. Breck
William H. Breck,
Appellant Pro Per "

" COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE

FIRST APPELLATE DISTRICT

DIVISION : 5

VILLAGE ON THE BAY DEVELOPMENT

vs.

VENTURE FUND I, ET AL.

A059207

Solano County No. 97166

FILED

JUN 30 1993

Court of Appeal - First App. Dist.

Ron D. Barrow

By_____

BY THE COURT:

The request for publication of the opinion filed June 16, 1993 is denied.

Dated: JUN 30 1993

/s/ PETERSON, P. J.

P.J. "

"

GREAT SEAL
of the State
of California

State of California
COURT OF APPEAL
First Appellate District
Division Five
Marathon Plaza - South Tower
303 Second Street, Suite 600
San Francisco, CA 94107

J. CLINTON PETERSON
Presiding Justice

June 29, 1993

The Honorable Malcolm Lucas
Chief Justice, California Supreme Court
303 Second Street, South Tower
San Francisco, CA 94107

Re: Village on the Bay Development v. Venture Fund I
First District Court of Appeal No. A059207

Dear Chief Justice Lucas:

A request has been made for publication of the unpublished opinion in the above captioned action. This court has denied the request for publication, and herewith transmits a copy of the opinion and the request to the Supreme Court pursuant to California Rules of Court, rule 978(a).

It is the recommendation of this court that the request be denied. The opinion neither establishes new law, nor modifies or criticizes existing rules of law, nor involves a legal issue of continuing public interest. (Cal. Rules of Court, rule 976(b).)

Very truly yours,

/s/ PETERSON, P. J.

PETERSON, P. J.

/s/ KING, J.

KING, J.

/s/ HANING, J.

HANING, J.

Enclosures
cc: Ron D. Barrow, Clerk
All Counsel

"

" COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE

FIRST APPELLATE DISTRICT

DIVISION : 5

VILLAGE ON THE BAY DEVELOPMENT

vs.

VENTURE FUND I, ET AL.

A059207

Solano County No. 97166

FILED

JUN 30 1993

Court of Appeal - First App. Dist.

Ron D. Barrow

By_____

BY THE COURT:

The petition for rehearing is denied.

Dated: JUN 30 1993

/s/ PETERSON, P. J.

_____ P.J. "

" Supreme Court Case No: _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

VILLAGE ON THE BAY DEVELOPMENT, et al, Plaintiffs and Cross-Defendants, vs. VENTURE FUND I and WILLIAM H. BRECK, et al, Defendants and Cross-Claimants,	Petition To Review Decision Of The Court of Appeal First Appellate District Division Five Case No. A059207
VENTURE FUND I and WILLIAM H. BRECK, Appellants, vs. VILLAGE ON THE BAY DEVELOPMENT, et al, Appellees.	Appeal from the Superior Court for Solano County Judge Dennis Bunting Superior Court Case No. 97166

PETITION FOR REVIEW

Submitted by:

WILLIAM H. BRECK, Pro Per,
Individually and as Successor in Interest
and former General Partner of
VENTURE FUND I
(an Alaska Limited Partnership dissolved by
expiration of its stated term on December 31, 1991)

Dated: JULY 26, 1993

/s/ William H. Breck

WILLIAM H. BRECK
1159 C Porter Street
Vallejo, CA 94590
Phone: 707-557-5311
Fax: 707-557-5312

Accepted for Filing in the Office of the
Supreme Court for the State of California,
on this _____ day of JULY, 1993.
By: _____
_____Clerk of the Court

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

VILLAGE ON THE BAY DEVELOPMENT, et al, Plaintiffs and Cross-Defendants, vs. VENTURE FUND I and WILLIAM H. BRECK, et al, Defendants and Cross-Claimants, VENTURE FUND I and WILLIAM H. BRECK, Appellants, vs. VILLAGE ON THE BAY DEVELOPMENT, et al, Appellees.	**Petition To Review Decision Of The Court of Appeal First Appellate District Division Five Case No. A059207** Appeal from the Superior Court for Solano County Judge Dennis Bunting Superior Court Case No. 97166

PETITION FOR REVIEW
STATEMENT OF ISSUES

I. Review should be Granted in this case because the Decision of the First District Court of Appeal announces **A New Rule of 'Authority' for Attorneys in relation to Compromise Settlements of litigation, negotiated on behalf of Corporate Clients**, which is a substantial departure from the prior law of the State of California and is in conflict with the Decisions of other Courts of Appeal -- **holding that an Attorney is 'authorized' (without any showing of special 'authority') to enter into a binding Settlement Agreement under CCP 664.6 and CCP 877 on behalf of absent Corporate Clients, without the Client's knowledge or consent, without the participation of any authorized officer of the Corporate Client in the settlement negotiations, and without written authority from the Corporate Client, merely because the Attorney represented the Corporate Client in "legal pleadings"filed in a Court**.

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VI. Review should be Granted in this case because the Decision of the first District Court of Appeal has **arbitrarily and capriciously established rules** relating to the interpretation and enforcement of the 'Memorandum of Settlement' under CCP 664.6 and CCP 877 in this case, which are **different from and less favorable to the Non-Resident Appellant** than the rules traditionally applied by the California Courts to the interpretation and enforcement of Compromise Settlements under CCP 664.6 and CCP 877 between Citizens

of the State of California, **in violation of the Privileges and Immunities Clause and the Due Process and Equal Protection Clauses of the 14th Amendment** to the United States Constitution, and similar provisions of the California Constitution.

INTRODUCTION

The ability of litigants, and their counsel, to resolve their differences through face to face settlement negotiations outside of a judicial forum, with reasonable confidence in the clarity of the rules governing a compromise settlement, with reasonable confidence in the identity of the other parties to the settlement, and with reasonable confidence as to the matters included in, and excluded from, the scope of an 'expressly written' Settlement Agreement (when one is finally signed) is among the most important Public Policy Issues that this Court can address.

In this case, Appellants (Venture Fund/Breck) entered into a 'written' agreement (the 'Memorandum of Settlement') with some (but less than all) of the Respondent parties involved in the instant litigation. Three (3) Respondent corporations did not participate in the settlement conference through any authorized officer, and did not sign the 'Memorandum of Settlement', i.e. (1) Pacific Savings Bank (hereafter "PACIFIC SAVINGS BANK") and its subsidiaries, (2) PSB Realty, Inc. (hereafter "PSB REALTY"), and (3) Pacifica Bay Village Associates, Inc. (hereafter "PACIFICA").

The 'Memorandum of Settlement' named only the parties who were actually present at the negotiations and who actually signed the 'Memorandum of Settlement'. The 'Memorandum of Settlement' did not include the names of any of the three (3) Respondent corporations who were absent from, and not participating in, the settlement conference. The 'Memorandum of Settlement' did not refer to the Real Property owned by the absent Respondents, or to the interests of Appellants in such Real Property. The 'Memorandum of Settlement' contemplated only the payment of money to Appellant, from funds owned solely by those Respondents who were actually present at the settlement conference and who signed the 'Memorandum of Settlement', in exchange for a dismissal 'with prejudice' of the

complaints filed: (1) by Appellant (Venture Fund/Breck); and (2) by those Respondents who actually signed the 'Memorandum of Settlement'; as against each other. And, the 'Memorandum of Settlement' was only stated to be "a binding and enforceable agreement between the parties hereto"-- emphasis added [1] -- with no further statement that it was intended to be binding as to any of the absent Respondent corporations, or to affect their rights or liabilities in any respect.

The Court of Appeal acknowledged: (1) that no corporate officer of any absent Respondent was present at or participated in the Settlement negotiations;[2] (2) that no corporate officer of any absent Respondent signed the 'Memorandum of Settlement';[3] (3) that none of the parties actually present at the Settlement negotiations had 'authority' to sign on behalf of the absent Respondent corporations;[4] and (4) that none of the absent Respondent corporations were named in the 'Memorandum of Settlement'.[5]

Notwithstanding these achnowledged facts, however, the Court of Appeal concluded that the signature of the attorney alone was sufficient to bind the three (3) non-participating, non-signing, unnamed and absent Respondent corporations:

> "[W]e do not hold that Pacific Savings Bank or its related entities were released by the actions of Jonathan Group, Inc.'s representatives. Instead, we conclude that Matthew [the Respondents' attorney], by signing the agreement, effectively bound all her clients, including Pacific Savings Bank and its related entities [the non-participating, unnamed, absent Respondent corporations]." [6]

The sole basis cited by the Court of Appeal for its conclusion that Respondents' attorney had the 'authority' to "effectively [bind] all

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1 'Memorandum of Settlement' - Document #9 in Appellant's Appendix - Vol. I, at p. 186.

2 Court of Appeals Decision filed June 16, 1993, at pp. 5 & 6.

3 Court of Appeals Decision filed June 16, 1993, at p. 5.

4 Court of Appeals Decision filed June 16, 1993, at p. 9.

5 Court of Appeals Decision filed June 16, 1993, at pp. 4 & 8.

6 Court of Appeals Decision filed June 16, 1993, at p. 9.

her clients", including the three (3) Respondent corporations who were absent from and not participating in the settlement negotiations, and who were not named in the 'Memorandum of Settlement', was that:

> "... it is undisputed that Matthew [the Respondents' attorney] represented all the respondents in this case, including Pacific Savings Bank and its related entities, in all legal pleadings filed in this case." -- Emphasis Added. [7]

Thus, the holding of the Court of Appeal in this case appears to be directly contrary to the settled law of this State, as stated in the prior decisions of this Court in Folsom vs. Butte County Ass'n of Govts., [8] (i.e., settlement agreements are contracts and have binding effect only on the parties thereto), and Mesler vs. Bragg Management Co. [9] (i.e., an attorney representing multiple parties is responsible to have all of his/her clients present at the settlement negotiations, "with every party's identity fully disclosed"; and "when, as here ... , the terms of the settlement and release expressly include only the subsidiary and no other party, the parent should not magically benefit from the agreement." -- emphasis added).

The Decision of the First District Court of Appeal in this case is also inconsistent with, and creates a conflict with, the prior decisions of other Courts of Appeal,[10] which require the concurrence of each settling party to be evidenced by the signature of that party (or the party's authorized officer) on a pertinent settlement document,[11] and

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7 Court of Appeals Decision filed June 16, 1993, at p. 8.

8 Folsom vs. Butte County Ass'n of Govts, 32 Cal3d 668, 186 CR 589, 652 P2d 437 (1982); also Estate of Baum, 209 CA3d 744, 257 CR 566 (1st Dist., 1992)

9 Mesler vs. Bragg Management Co., 39 Cal3d 290. 216 CR 443, 702 P2d 601 (1985); also Valdez vs. Smith, 166 CA3d 723, 212 CR 638 (5th Dist., 1985)

10 Gallo vs. Getz, 205 CA3d 329, 252 CR 193 (4th Dist., 1988); Fresno vs. Maroot, 189 CA3d 755, 234 CR 353 (1988); Datatronic Systems Corp. vs. Speron, Inc., 176 CA3d 1168, 222 CR 658 (2nd Dist., 1986); Burbank Studios vs. Workers Comp. Appeals Board, 134 CA3d 929, 184 CR 879 (2nd Dist., 1982); Nicholson vs. Barab, 233 CA3d 1671, 285 CR 441 (2nd Dist., 1991); Winet vs Price, 4 CA4th 1159, 6 CR2d 554 (4th Dist., 1992).

11 Gallo vs. Getz, 205 CA3d 329, 252 CR 193 (4th Dist., 1988) – bank draft evidencing final settlement of a claim, may be sufficient in a personal injury case;

which hold the 'Statute of Frauds' and the 'Equal Dignities Rule', to be applicable to 'settlement agreements' pertaining to Real Property -- matters upon which this Court has not specifically ruled.

And the Decision of the Court of Appeal in this case, is arbitrary and capricious, contrary to the undisputed evidence in the Record, and inconsistent with applicable statutes, and deprives Appellant of Contract Rights and Interests in Real Property in violation of Appellant's rights under the 'due process clause', the 'equal protection clause', and the 'privileges and immunities clause', applicable to the States by and through the 14th Amendment to the United States Constitution, and similar rights and privileges guaranteed by the California Constitution.

Therefore, Appellant submits that it is of the Utmost Public Policy Importance that this Court should Review the Decision of the Court of Appeal in this case, in order to consider and repudiate (or explain and promulgate) the New Rule announced by the Court of Appeal in this case, that grants an Attorney (who files "legal pleadings") the New and Unlimited 'Authority':

(1) to 'negotiate' a compromise settlement for a corporate client:

  (a) in the absence of every authorized officer of the client corporation;

  (b) without participation or knowledge of the client corporation;

  (c) without written authorization from the client corporation;

  (d) without naming the client corporation in the agreement; and then

(2) to 'bind' the client corporation by the Attorney's 'signature' alone:

  (a) without correcting any of these deficiencies; and

  (b) without disclosing the 'Authority' claimed by the Attorney (i.e., to act for, and to bind, the absent client

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Nicholson vs. Barab, 233 CA3d 1671, 285 CR 441 (2nd Dist., 1991) -- letters between attorneys, not signed by client, not sufficient

corporation) in the signature block, or otherwise in the agreement 'written' by that Attorney;

The ability of California Attorneys to avoid (or terminate) protracted litigation by negotiated out-of-court Settlements is of the utmost importance [12] to the ability of the California Judicial System to efficiently resolve disputes between private parties.

The ability of California Attorneys to resolve private disputes by negotiated out-of-court settlements depends on the consistent application of clearly stated, uniformly applicable rules governing the formation, interpretation and enforcement of 'written' out-of-court compromise settlements entered into under CCP 664.6 and CCP 877.

It is essential that every counsel involved in settlement negotiations be able to clearly ascertain (and know) the identity of the parties to a settlement,[13] particularly when opposing counsel represents multiple parties. It is essential that every counsel involved in settlement negotiations have confidence in what rules of interpretation will be applied,[14] and the meaning and effect to be given, to the words 'written' in an out-of-court Settlement Agreement. And, it is essential that every counsel involved in settlement negotiations be informed as to the applicability and effect of the 'Equal Dignities Rule' [15] and the 'Statute of Frauds' [16] to out-of-court

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12 Villa vs. Cole, 4 CA4th 1327, 6 CR2d 644 (1st Dist., 1992); Nicholson vs. Barab, 233 CA3d 1671, 285 CR 441 (2nd Dist., 1991)

13 Civil Code 1558 - "It is essential to the validity of a contract, not only that the parties should exist, but that it should be possible to identify them."

14 Civil Code 1635 - "All contracts [...] are to be interpreted by the same rules..."

Civil Code 1639 - "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible [...]."

Civil Code 1649 - "If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it."

Civil Code 1654 - "In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist."

15 Civil Code 2309 - "[A]n authority to enter into a contract required by law to be in writing can only be given by an instrument in writing."

Settlement Agreements which involve corporate clients, or which may be claimed (or purport) to affect an interest in Real Property.

This case presents these important Public Policy Issues for determination by this Court.

STATEMENT OF FACTS

In essence, this case involves a dispute as to whether Appellant lost the right to enforce its Mortgage Lien against Real Property owned in the name of one of Respondent corporations (i.e., Pacifica Bay Village Associates, Inc. [hereafter "PACIFICA"]), by virtue of the 'Memorandum of Settlement' signed by Appellant on June 19, 1989, following a day-long mediated settlement conference, between Appellant and Respondents Kauftheil and Chase (dba the Jonathan Group, Inc. and its affiliates). It is undisputed that the settlement conference **did not** include any authorized officer of the other Respondents, i.e. PACIFICA (and its parent and affiliated corporations, PSB Realty, Inc. [hereafter "PSB REALTY"], and Pacific Savings Bank [hereafter "PACIFIC SAVINGS BANK"]).

Toward the end of the day, the 'Memorandum of Settlement' was prepared by Respondents' counsel in her own 'hand-writing' and was presented to Appellant for signature without explanation or discussion of its meaning or effect.[17] The 'Memorandum of Settlement' stated that it was intended to compromise and settle "all claims" between "the parties hereto".[18]

The 'Memorandum of Settlement' was signed by Appellant, William Breck (as "General Partner, Venture Fund I and

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16 Civil Code 1624 - "The following contracts are invalid, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged [...]

(c) An agreement [...] for the sale of real property, or of an interest therein [...]."

17 Since all negotiations were conducted through the 'mediator' without any face to face discussions between the parties. -- See Breck Declaration -- Doc. #17 in Appellant's Appendix Vol III at pp. 271-272.

18 Memorandum of Settlement -- Doc. # 9 in Appellant's Appendix Vol I at p. 186.

individually"), and by his attorney, Mr. Douglas (as "counsel for William H. Breck and Venture Fund I").[19]

The Settlement Agreement was also signed by two (2) of Respondents, Mr. Lee Kauftheil (as "Secretary of Jonathan Group, Inc., and as individual") and by Mr. Gary Chase (as "President Jonathan Group, Inc., and as individual"), and by their attorney, Ms. Matthew (as "counsel for Jonathan Group, Inc., et al").[20]

All of the parties present were aware,[21] and the Court of Appeals acknowledged[22] that the parties present (i.e., Kauftheil and Chase) had no authority to represent any of the three (3) **absent** Respondent corporations at the 'settlement conference' (i.e., PACIFICA, PSB REALTY, and their parent corporation, PACIFIC SAVINGS BANK). And, no evidence of "written" authority was ever produced from any of the three (3) absent corporations, conferring signature authority upon anyone present at the 'settlement conference'.[23]

All of the parties present were aware,[24] and the Court of Appeal acknowledged,[25] that no authorized officer was present or participated in the settlement conference on behalf of the PACIFIC

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19 id.

20 id.

21 Kauftheil and Chase (the only Respondents present at the settlement conference) never claimed to be executive officers of the Pacific Savings Bank, or its affiliates (Pacifica and PSB Realty), or to have any authority to bind Pacific Savings Bank or its affiliates by their signatures. -- See Plaintiffs' Complaint - Doc #1 at Appellant's Appendix - Vol I at p. 1; and Plaintiffs' answer to Cross-Complaint - Doc #7 at Appellant's Appendix Vol I at p. 152. In addition, the 'Notice of Dissolution of Partnership' on file in the public records stated that: "After January 16, 1989, no member of Village on The Bay Development may bind the joint venture except for Pacifica Bay Village Associates, Inc." -- See Appellant's Appendix Vol I at p. 200, and Vol II at p. 470.

22 Court of Appeals Decision filed June 16, 1993, at p. 9.

23 Appellant objected to Respondents' counsel's unsubstantiated claim of authority to represent all of the Respondents in the Trial Court, but Respondents' counsel never produced any evidence of 'written' authority. -- See Doc #24 in Appellant's Appendix Vol III at pp. 652-654.

24 See Breck's Declaration regarding the parties present at the beginning of the settlement conference -- Doc. #17 in Appellant's Appendix Vol III at pp. 271-272.

25 Court of Appeal Decision filed June 16, 1993, at p. 8-9.

SAVING BANK or either of its subsidiaries (i.e., PACIFICA and PSB REALTY).

All of the parties present were aware,[26] and the Court of Appeal acknowledged,[27] that no authorized officer of the PACIFIC SAVINGS BANK or either of its subsidiaries (i.e., PACIFICA or PSB REALTY) signed the 'Memorandum of Settlement'.

All of the parties present were aware,[28] and the Court of Appeal acknowledged,[29] that the 'Memorandum of Settlement' **does not** name or expressly refer to the PACIFIC SAVINGS BANK or either of its affiliates (i.e., PACIFICA or PSB REALTY).

It is also clear from the four-corners of the 'Memorandum of Settlement' that: (1) there is no statement or explicit reference to the Real Property then owned by PACIFICA in the 'Memorandum of Settlement'; (2) there is no statement or explicit reference to any intent to 'pay', 'satisfy' or 'discharge' the debt then owed to Appellant from PACIFICA in the 'Memorandum of Settlement'; (3) there is no statement or explicit reference to any intent to 'remove', 'release', or 'reconvey' the 'Mortgage lien' of Appellant on the Real Property owned in the name of PACIFICA in the 'Memorandum of Settlement'; and (4) there is no statement or explicit reference to any intent to 'clear' or 'quiet' the title to the Real Property for the benefit of PACIFICA in the 'Memorandum of Settlement'.[30]

Nevertheless, upon motion by Respondents' counsel under CCP 664.6 the Trail Court 'determined' that Appellant's Mortgage Lien had been satisfied, and was rendered 'void' by the 'Memorandum of Settlement', without any explanation of reasons or citation of evidence.

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26 Memorandum of Settlement - Doc #9 in Appellant's Appendix Vol I at p. 186.

27 Court of Appeals Decision filed June 16, 1993, at p. 8-9.

28 Memorandum of Settlement - Doc #9 in Appellant's Appendix Vol I at p. 186.

29 Court of Appeals Decision filed June 16, 1993, at p. 5.

30 Memorandum of Settlement - Doc #9 in Appellant's Appendix Vol I at p. 186.

Upon Appeal, the Court of Appeals concluded that Appellants (Venture Fund/Breck) had released all of their claims (including the Mortgage Lien and Debt) against the absent parties (PACIFIC SAVINGS BANK, PSB REALTY and PACIFICA), because:

> "Matthew [Respondents' counsel], by signing the ['Memorandum of Settlement'] agreement, effectively bound all her clients including Pacific Savings Bank and its related entities [i.e., PSB REALTY and PACIFICA]."[31]

The Court of Appeal cited No legal authority to support its conclusion that Respondents' counsel had such "authority", and none is known to exist.

The only factual basis for the Court of Appeal's Decision that Matthew had "authority" ('actual', 'apparent', or 'implied') for Respondents' counsel's signature to have "effectively bound" her absent corporate clients, appears in the Court of Appeal's statement that:

> "it is undisputed that Matthew [Respondents' counsel] represented all the respondents in this case, including Pacific Savings Bank and its related entities, in all legal pleadings filed in this case." -- Emphasis Added. [32]

Although the Court of Appeal acknowledged that its construction of the 'Memorandum of Settlement' also requires the release and reconveyance of the Appellants' 'Mortgage Lien' against the Real Property owned by PACIFICA, nevertheless the Court of Appeal held that neither the 'Equal Dignities Rule' [33] nor the 'Statute of Frauds' [34] was applicable to the interpretation of the 'Memorandum of Settlement', for the reason that:

> "[T]hese rules [the 'statute of frauds' and the 'equal dignities rule'] require a writing only when the "party to be charged" seeks to avoid an agreement; and here, the parties to be charged

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31 Court of Appeals Decision filed June 16, 1993, at p. 9.

32 Court of Appeals Decision filed June 16, 1993, at p. 8.

33 Civil Code 2309 – "[...] an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing."

34 Civil Code 1624 - Agreement for sale of interest in real property required to be in writing.

(appellants) clearly signed the June 19, 1989, settlement agreement. It is irrelevant, under the statute of frauds and the equal dignities rule, whether parties who admit the validity of an agreement have written authority to sign."[35]

And, the Court of Appeal also held that it was bound by the Trial Court's interpretation of the 'Memorandum of Settlement' because of 'conflicting evidence' [36] regarding statements made by Respondents' counsel at the commencement of the day-long settlement conference (eventhough there is no material conflict in the evidence cited by the Court of Appeal).[37]

And the Court of Appeal cited the 'failure of Appellant to protest' against an 'unsigned later proposed draft' settlement agreement prepared by Respondents' counsel, as supporting the Trial Court's interpretation of the 'Memorandum of Settlement'[38] (eventhough the undisputed evidence in the Record shows that Appellant did 'protest' the 'later proposed draft' agreement).[39]

A Rehearing was requested by Appellant,[40] but was denied by the Court of Appeal, [41] as to all of these issues: i.e., (1) the 'authority' of an 'Attorney' to bind absent, unnamed, non-participating, non-signing and non-consenting client corporations to a 'Settlement Agreement' under CCP 664.6 and CCP 877, based merely upon the fact that the Attorney represented the corporate client 'as counsel' in "legal pleadings" filed in court; (2) the application of the 'Equal Dignities Rule' to require that the Respondents' counsel have "written authority" to execute the 'Memorandum of Settlement' on behalf of her absent, non-participating, non-named, and non-signing corporate clients; (3) the application of the 'Statute of Frauds' to require that the 'Memorandum of Settlement' contain "all essential terms" necessary

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35 Court of Appeal Decision filed June 16, 1993, at pp. 9-10.

36 Court of Appeal Decision filed June 16, 1993, at p. 7.

37 See discussion at pp. 20-22, infra.

38 Court of Appeal Decision filed June 16, 1993, at pp. 8.

39 See discussion at pp. 22-23, infra.

40 Appellant's Petition For Rehearing, dated June 22, 1993.

41 Court of Appeal's Order Denying Petiition For Rehearing, dated June 30, 1993.

to show the 'intent to convey' the interest in Real Property from the Appellant to the absent, non-participating, non-named and non-signing party, PACIFICA; (4) the error of the Court of Appeal in determining that it was required to defer to the Trial Court interpretation of the 'Memorandum of Settlement' by 'conflicting evidence' (not conflicting in any material respect) ; and (5) the evidence of 'protest by Appellant' against the 'later draft' settlement agreement, proposed by Respondents' counsel after the fact, which had been overlooked by the Court of Appeal.

ARGUMENT

I. Review should be Granted in this case because the Decision of the First District Court of Appeal announces **A New Rule of 'Authority' for Attorneys in relation to Compromise Settlements of litigation, negotiated on behalf of Corporate Clients,** which is a substantial departure from the prior law of the State of California and is in conflict with the Decisions of other Courts of Appeal -- **holding that an Attorney is 'authorized' (without any showing of special 'authority') to enter into a binding Settlement Agreement under CCP 664.6 and CCP 877 on behalf of absent Corporate Clients, without the Client's knowledge or consent,** and **without the participation of any authorized officer of the Corporate Client in the settlement negotiations,** and **without written authority from the Corporate Client, -- merely because the Attorney represented the Corporate Client in "legal pleadings" filed in a Court**.

Prior to the Decision of the First District Court of Appeal in this case, the law of California appeared to be settled, that an Attorney did not have 'authority' (merely by virtue of his/her position as "attorney" for the client) to bind his/her client to a compromise settlement without the Client's participation and consent (evidenced by the signature of the Client on the settlement documents). Otherwise, the Client was not to be held bound by the settlement. And, no one could to be held to be bound to a compromise settlement

with a person or corporation who was not a signatory party to the settlement agreement.[42]

Also, since the 1985 Decision of this Court in Mesler vs. Bragg Management Co.,[43] it seemed to be clearly established that: (1) it is the duty of counsel to bring an authorized officer of each corporate client to a settlement conference; and (2) it is also the duty of counsel to assure that "every [corporate] party's identity [is] fully disclosed" in the negotiation of a compromise settlement. And, in Mesler, this court seemed to make it clear that any corporate client who was not "expressly include[d]" as a named party to a particular compromise settlement, "[c]ould not magically benefit from the agreement." [44]

Moreover, Mesler vs. Bragg Managment Co. dealt with the exact same situation as this case, where one attorney, representing multiple corporate clients, entered into a compromise settlement, which was signed by one or more (but less than all) of his corporate clients, and the settlement agreement was held by this Court to include only the one corporate client who had participated in the negotiations, was "expressly" named in the agreement, and had signed the compromise settlement agreement. [45]

This Court, in Mesler vs. Bragg Management Co., clearly did not permit the 'non-named' corporate client to benefit from the compromise settlement between other parties,[46] eventhough only

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42 Folsom vs. Butte County Ass'n of Govts., 32 Cal3d 668, 186 CR 589, 652 P2d 437 (1982); Valdez vs. Smith, 166 CA3d 723, 212 CR 638 (5th Dist., 1985); Estate of Baum, 209 CA3d 744, 257 CR 566 (1st Dist., 1992); Mesler vs. Bragg Management Co., 39 Cal3d 290, 216 CR 443, 702 P2d 601 (1985); Gallo vs. Getz, 205 CA3d 329, 252 CR 193 (4th Dist., 1988); Fresno vs. Maroot, 189 CA3d 755, 234 CR 353 (1988); Datatronic Systems Corp. vs. Speron, Inc., 176 CA3d 1168, 222 CR 658 (2nd Dist., 1986); Burbank Studios vs. Workers Comp. Appeals Bd., 134 CA3d 929, 184 CR 879 (2nd Dist., 1982); Nicholson vs. Barab, 233 CA3d 1671, 285 CR 441 (2nd Dist., 1991); Winet vs. Price, 4 CA4th 1159, 6 CR2d 554 (4th Dist., 1992).

43 Mesler vs. Bragg Management Co., 39 Cal3d 290, 216 CR 443, 702 P2d 601 (1985)

44 id.

45 id.

46 id.

"alter-ego" liability was alleged as to the 'non-named', 'non-participating' corporation in Mesler, rather than the independent liability of a joint venturer on a Mortgage, as in this case.

Hence, the Court of Appeal Decision in this case appears to make a substantial departure from the prior law applicable to out-of-court settlements involving multiple corporate parties.

The Court of Appeal in this case, on the other hand, holds that an Attorney acquires "authority" (merely by filing "legal pleadings" in court for a Client) to bind an absent Corporate Client to a compromise settlement under CCP 664.6 and CCP 877:

(1) which is not signed by the Attorney "as the client", under color of authority;

(2) which is signed by the Attorney only as "counsel";

(3) which is signed by the Attorney as "counsel for [a different client]",

(4) which is signed by the Attorney with the adjunct "et al" added below the Attorney's signature, as the only effort to identify the Client for which the Attorney later claims to have acted;

(5) which is signed by the Attorney without the Client's knowledge or awareness;

(6) which is signed by the Attorney without effort to obtain, or evidence of obtained, approval or concurrence by the Client to the compromise;

(7) which is signed by the Attorney without the Client's presence at any time during the negotiation of the compromise settlement, or at the place where (or time when) the Attorney purportedly signs the compromise agreement;

(8) which is signed by the Attorney without any written authority from the Client Corporation to the attorney whatsoever;

(9) which is signed by the Attorney without even a claim of oral approval from an employee, officer or director of the Client corporation;

(10) which is 'written' and signed by the Attorney (who has total control over the document) without disclosing the Client's 'Name' at any point in the document;

(11) which is 'written' and signed by the Attorney (who has total control over the document) without disclosing any reference whatsoever to the Real Property which the Attorney later claims to be the subject of the 'settlement agreement'; and

(12) which is 'written' and signed by the Attorney (who has total control over the document) without disclosing any reference to the Real Property interests which the Attorney later claims were included for the benefit of her undisclosed Client.

Appellant submits that this has not previously been the law of the State of California applicable to out-of-court 'written' compromise settlement agreements under CCP 664.6 and CCP 877, and that this Court should grant Review to consider the ramifications of the New Rule of Attorney "Authority" announced by the First District Court of Appeals in this case.

II. Review should be Granted in this case because the Decision of the First District Court of Appeal erroneously failed to correctly apply the **'Equal Dignities Rule'** and the **'Statute of Frauds'** to interpretation of a settlement agreement involving 'absent' corporate parties and affecting interests-in Real Property.

The Court of Appeal held that the 'Statute of Frauds' and the 'Equal Dignities Rule' did not apply in this case because:

> "Next, appellants claim we cannot conclude Matthew had the authority to bind Pacific Savings Bank and its related entities because respondents never proved that Matthew had written authority to enter into a settlement agreement on their behalf. +++ [A]ppellants maintain written authority was required by the statute of frauds and the equal dignities rule. +++ However, these rules require a writing only when the "party to be charged" seeks to avoid an agreement; +++ It is irrelevant, under the statute of frauds and the equal dignities

rule, whether parties who admit the validity of an agreement have written authority to sign." [47]

The Equal Dignities Rule should have been applied to determine whether Matthew had authority to sign the 'Memorandum of Settlement' on behalf of the absent corporations.

However, the Court of Appeal erred by failing to apply the 'Equal Dignities Rule' to the assertion that Respondents' counsel had 'authority' to "bind" her absent corporate clients to the 'Memorandum of Settlement', since Attorneys "as counsel" historically have not had the authority of a statutory Executive Officer[48] to bind their corporate clients.

> "When an agent for a corporation purports to execute on behalf of the corporation any contract which is subject to the Statute of Frauds [or otherwise required by law to be in writing], except in the case of a document executed by the executive officer or an estoppel, the contract is not binding on the corporation unless there is a written resolution by the board of directors that provides authorization for the agent to enter into the contract [...] [citations to numerous cases omitted]." [49]

Out-of-court settlement agreements are required by CCP 664.6 to be in writing, in order to be enforceable, regardless of whether they pertain to Real Property.[50]

Therefore, the Court of Appeal should have considered the conjunction of the CCP 664.6 requirement of a 'writing' in relation to the 'Equal Dignities Rule' of Civil Code 2309, and the rule of corporate authority embodied in Corporations Code 313.

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47 Court of Appeals Decision at pp. 9-10.

48 Corporations Code 313

49 Miller & Starr, California Real Estate Law, 2nd Edition, Section 1:72, at pages 206-207.

50 Code of Civil Procedure 664.6 - "If parties to pending litigation stipulate, in writing or orally before the court, for settlement of the case, or part thereof, the court upon motion, may enter judgment pursuant to the terms of the settlement." - Emphasis Added.

Appellant made it a point to object in the Trial Court to any evidentiary inference that might be drawn from Attorney Matthew's Declaration that "[she] always represented all of the Respondents in this case", [51] as inadmissible evidence under the Hearsay Rule and the 'Best Evidence Rule' (since Attorney Matthew was required by the 'Equal Dignities Rule' to have had 'written authority' from the client corporation, to sign a settlement agreement required by law to be in writing), if Attorney Mattthew intended to claim the 'authority' to bind the client corporation by her signature alone, to an out-of-court settlement required by law to be in writing.[52]

However, Respondents neither produced evidence of 'written authority' for Attorney Matthew, nor claimed that Attorney Matthew had such 'written authority' to bind the absent Respondent corporations. And, in the absence of such 'written authority', the conclusion is inescapable, that Attorney Matthew had 'no authority' to bind the absent Respondent corporations.[53]

The Court of Appeal's answer ('that the rule only applies to the party who seeks to avoid a contract') is not responsive or sufficient to respond to this complete absence of evidence of 'written authority', since the burden of proof rests squarely on the absent Respondent corporations to show that they entered into a 'contract' (in the form of

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51 Note that Matthew's statement actually did not claim any personal authority:

"3. At all times during this litigation, Miller Starr & Regalia has represented all of the plaintiffs in this action, including both partners to the joint venture. +++ Miller Starr & Regalia continued to represent all plaintiffs through the settlement, and the distribution of the assets in the escrow account." – Matthew's Declaration - Doc #22 in Appellant's Appendix Vol III at p. 638.

52 Code of Civil Procedure 664.6 and Civil Code 2309; see Appellant's Objection to the Matthew's claim of authority - at Doc #24 in Appellant's Appendix Vol III at pp. 271-272.

53 Since Respondents produced no evidence of Matthew's authority 'in writing', in response to Appellant's objection, the sole statement upon which the Court of Appeal relied (for its conclusion that Attorney Matthew 'bound all her clients', including the absent Respondent corporations, by her signature) is not admissible, and may not be relied upon, as 'evidence' of any 'authority' given to Matthew by the Client corporations, under Civil Code 2309, Code of Civil Procedure 664.6, and Corporations Code 313.

the out-of-court 'Memorandum of Settlement') with Appellant,[54] and there is simply no evidence in the Record that can support the Court of Appeal's conclusion that such a 'contract' was ever formed. -- McGirr vs. Gulf Oil Corporation, 41 C.A.3d 246, 115 Cal.Rptr. 902 (C.A., 2nd Dist., 1974); Also see Miller & Starr, California Real Estate Law, 2nd Edition, Section 1:68, pp. 192-196, and Section 1:72, at pages 206-207.

Since the Court of Appeal Decision seems to acknowledge that Respondents' counsel never claimed to act in any capacity other than as "counsel for" Respondents,[55] it is only in her capacity as "counsel for" Respondents that the Court of Appeal appears to hold that Ms. Matthew "bound all her clients" by her signature to the 'Memorandum of Settlement".[56]

Therefore, Appellant submits that it seems clear that the Court of Appeal was adopting a New Rule of Authority for Attorneys who file "legal pleadings" for a corporate client, which should be submitted to Review by this Court for the reasons mentioned above.

The rules relating to the 'sufficiency of a writing' to meet the requirements of the 'Statute of Frauds' should have been applied to the 'written' 'Memorandum of Settlement' to determine whether the agreement was intended to 'satisfy' the Mortgage Lien of Appellant against the Real Property of the absent corporate party, PACIFICA.

In order for a court to compel a party to convey or transfer an interest in Real Property, the party seeking the transfer of the Real Property 'Interest' must sustain the burden of proof that the 'writing' contains "all required terms" to satisfy the 'Statute of Frauds'.[57]

Since Respondents claim that Appellant's Mortgage Lien was 'satisified' by the 'Memorandum of Settlement' and that Appellant is therefore required to reconvey or release its Mortgage Lien on the

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54 Fisher vs. Superior Court, 103 CA3d 434, 163 CR 47 (1980)

55 See FtNt 51 supra.

56 Court of Appeal's Decision filed June 16, 1993, at p. 8.

57 Allman vs. Rich, 245 P.2d 439, 76 CA 601 (1926); Greenburg vs. Superior Court, 131 CA3d 441, 182 CR 466 (1982); Nicholson vs Barab, 233 CA3d 1671, 285 CR 441 (1991)

Real Property owned by PACIFICA, the Court of Appeals should have determined whether the 'writing' constituted a sufficient 'memorandum' to meet the requirements of the Statute of Frauds.[58]

In this case, it is undisputed that the 'Memorandum of Settlement' contains NO mention of any Real Property, NO mention of the Name of the Owner of the Real Property, NO mention of the 'Mortgage Lien' interest on the Real Property, NO mention of the underlying 'Debt' secured by the Mortgage on the Real Property, NO reference to any 'intent' to 'pay-off', 'satisfy' or 'discharge' the underlying 'Debt', NO reference to any 'intent' to secure a 'release', 'reconveyance' or 'satisfaction' of the 'Mortgage Lien', and NO reference to any 'intent' to 'clear', 'remove the cloud from' or 'extinguish the lien on' the title to the Real Property.

At least some of these should have been considered to be 'essential terms', required by the Statute of Frauds to be in the 'written memorandum', -- in addition to Appellant's signature.[59]

Appellant further submits that the failure of the Court of Appeal to have considered the application of the 'Statute of Frauds' to the 'Memorandum of Settlement' is not dependent on the validity of the New Rule of 'Authority' adopted by the First District Court of Appeals for Attorneys, and therefore should have been independently considered.

And, the dismissal of Appellant's 'Statute of Frauds' arguments for the sole reason that

> "[...] appellants [...] clearly signed the June 19, 1989, settlement agreement"[60]

is inconsistent with the Decisions of other Courts of Appeal which have held that the Statute of Frauds is applicable to out-of-court settlements, and that further consideration of the terms of the 'writing'

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58 Ganiats Construction, Inc. vs. Hesse, 4 CR 706, 180 CA2d 377 (1960); California Trust vs. Bennett, 33 Cal2d 694, 204 P2d 324 (1949)

59 Ths substantive portion of an agreement required to be in writing (by the Statute f Frauds) cannot be proved by Parol Evidence. -- Dusold vs. Johnson, 225 P2d 536, 101 CA2d 907 (1951); Franklin vs. Hansen, 381 P2d 386, 30 CR 530, 59 Cal2d 570 (1963).

60 Court of Appeal's Decision filed June 16, 1993, at p. 10.

is required by the Statute of Frauds, when the 'agreement' is claimed (or purports) to affect an interest in Real Property.[61]

III. Review should be Granted in this case because the Decision of the First District Court of appeal erroneously determined that it was required to defer to the Trial Court's interpretation of the 'written' 'Memorandum of Settlement' **due to a non-material 'conflict in the evidence'** as to statements made by Attorney Matthew at the commencement of the settlement conference.

The only 'conflict in the evidence' which the Court of Appeal cited, was the between:

(1) the statement in Breck's Declaration describing the statement made by Attorney Matthew at the commencement of the day long settlement conference, indicating that there were no authorized officers 'representing' the Pacific Savings Bank (and its affiliates, Pacifica and PSB Realty) present at the settlement conference, and that Attorney Matthew and her associate were 'representing' only the Jonathan Group (indicating Messers. Kauftheil and Chase seated next to her) at this settlement conference;[62] and

(2) the statement in Matthew's Declaration that "respondents' counsel at all times represented all respondents".[63]

However, the statement by Attorney Matthew is not inconsistent with the statement in Breck's Declaration, since the words "represent" and "representation" obviously refer to different kinds of "representation", i.e., "representation" as a corporate officer, and "representation" as 'counsel'. In addition, Matthew does not deny that part of the statement in Breck's Declaration which states that "no representative of the Pacific Savings Bank was present or participating in the settlement conference."[64] Respondents have

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61 See FtNts 57-59 supra.

62 Breck's Declaration - Doc # 17 (para. #9) in Appellant's Appendix Vol II at p. 271.

63 Matthew's Declaration - Doc #22 (para. #3) in Appellant's Appendix Vol III at p. 638

64 id.

never claimed that an authorized officer of the Pacific Savings Bank (or its affiliates) did attend the settlement conference, and it is obvious that the 'Memorandum of Settlement' contains no such signature.

Moreover, Matthew does not indicate in her Declaration what she claims to have said at the settlement conference (to the extent she denies Breck's version of her statements), so that there is no evidence beyond her claim to have "always represented (obviously meaning "as counsel") all of the Respondents".[65]

And, whether any conflict exists in fact between these two statements is actually irrelevant to the determination of the meaning of the words of the 'written' 'Memorandum of Settlement'.

> "[...] The resolution of a mixed question of fact and law requires three steps: (1) determining what happened, (2) selecting the applicable rules of law, (3) applying the rules to the facts. (People vs. Louis (1986) 42 Cal.3d 969, 984-988 [232 Cal.Rptr.110, 728 P.2d 180].[11] It is only in the first step, where the evidence of what happened presents a conflict, that there is any occasion for the weighing of evidence in any sense [...]." -- FPI Development vs. Nakashima, 231 Cal.App.3d 367, at 391-392, 282 Cal.Rptr. 508 (C.A., 3rd Dist., 1991).
>
> "Since the matter concerns the effect of a written contract, only the first step is assigned to the trial court for purposes of appellate review. (See Parsons vs. Bristol Development Co. (1965) 62 Cal.2d 861, fn. 1 [44 Cal.Rptr. 767, 402 P.2d 839]; Rest.2d Contracts, Sec. 212, Com. d.)". -- FPI Development vs. Nakashima, 231 Cal.App.3d 367, ftnt. [11] at 391, 282 Cal.Rptr. 508 (C.A., 3rd Dist., 1991).

In this case, it is Not Disputed that the PACIFIC SAVINGS BANK and its affiliates (PACIFICA and PSB REALTY) Did Not Participate in the settlement conference, or sign the 'Memorandum of Settlement'. Hence, whether Matthew made the statement alleged by Breck (using the word 'represent') or not, at the beginning of the day-long settlement conference, is simply irrelevant to the interpretation of the

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65 id.

'written' 'Memorandum of Settlement' which was signed by the parties who were present, at the end of the day-long settlement conference. The 'Memorandum of Settlement', as a written document, stands on its own, and whether Matthew made the statement regarding 'her limited representation', does not aid in understanding or interpreting the meaning of any of the words in the 'Memorandum of Settlement'.[66]

The only question (issue) is whether the PACIFIC SAVINGS BANK, and its afffiliates (PACIFICA and PSB REALTY) entered into a compromise settlement with the Appellant (through the 'Memorandum of Settlement' dated June 19, 1989).

And the answer, is clearly "NO". PACIFIC SAVINGS BANK, and its affiliates (PACIFICA and PSB REALTY) DID NOT enter into a 'written' agreement with Appellant (through the 'Memorandum of Settlement' or otherwise), since it is undisputed that no authorized officer of any of these Respondents was present at or participated in the negotiations, had knowledge of, or signed, the 'Memorandum of Settlement', -- **UNLESS** this Court approves and adopts the Court of Appeal's New Rule -- Mandating (or permitting) all absent and unnamed corporate clients of an Attorney to become Parties to a compromise settlement agreement signed by the Attorney (without presence, knowledge, consent, signature, written authority or other formality as to any absent corporate client), IF ONLY (a) the Attorney has filed "legal pleadings" for the client; AND (b) the Attorney signs "as counsel for [Another Client Corporation's Name] et al").

Since it is so extremely important that the issue of the "authority" of Attorneys to sign 'binding' Settlement Agreements for absent (and undisclosed) clients be clarified and resolved, Appellant requests this Court to grant Review of the Decision of the Court of Appeal in this case.

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66 FPI Development, Inc. vs. Nakashima, 231 CA3d 367, 282 CR 508 (1991); People vs. Louis, 42 Cal3d 969, 232 CR 110, 728 P2d 180 (1986); Parsons vs. Bristol Development Co., 62 Cal2d 861, 44 CR 767, 402 P2d 839 (1965)

IV. Review should be Granted in this case because the Decision of the First District Court of Appeal erroneously relied on the **absence of evidence of 'protest'** by Appellant against the 'later proposed draft' settlement agreement submitted by Attorney Matthew, **contrary to evidence of 'protest' by Appellant in the Record**.

The only other fact relied upon by the Court of Appeal was the supposed 'failure of Appellants' to protest the attempt of Respondents' counsel to add new terms and new parties (after the disbursement of funds had been accomplished pursuant to the prior 'Memorandum of Settlement') by Matthew's 'later proposed draft' settlement agreement. However, the Court of Appeal simply overlooked the evidence in the Record, that Appellant did, in fact, protest the belated attempt by Attorney Matthew to extend the terms and to add new parties to the previously agreed 'Memorandum of Settlement'.[67]

The oversight by the Court of Appeal was called to the Court's attention by Appellant's Petition for Rehearing, but was refused by the Court of Appeal.

Since the only 'evidence' cited by the Court of Appeal in support of its Decision does not exist, or is not competent, admissible or relevant to the determination of whether Pacifica (and its affiliates) were parties to the 'written' 'Memorandum of Settlement', and whether the 'Memorandum of Settlement' required the satisfaction and release of Appellant's 'Mortgage Lien' on the Real Property of PACIFICA, it should be apparent to this Court that Review should be granted in this case.

V. Review should be Granted in this case because the Decision of the First District Court of Appeal **impairs Appellant's Contract Rights and Property Interests in Real Property in violation of the 'Contract Clause'** in Article I, Section 10, of the United states Constitution, and because the Decision of the First District Court of Appeal is **'arbitrary and**

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67 See Breck's Declaration - Doc #17 in Appellant's Appendix Vol II at pp. 277-278; and Exhibit C to Doc #25 in Appellant's Appendix Vol III at p. 719.

capricious', contrary to the undisputed facts in the Record and not supported by any legal authority, and deprives Appellant of 'Due Process of Law' in violation of Appellant's rights under the 14th Amendment to the United States Constitution and similar provisions of the California Constitution.

For all of the reasons discussed hereinbefore, Appellant submits that it is clear on the undisputed facts in the Record that PACIFICA, PSB REALTY and PACIFIC SAVINGS BANK, were not parties to the 'Memorandum of Settlement' signed June 19, 1989, by Appellant with Messers. Kauftheil and Chase, dba the Jonathan Group, Inc. et al.

Hence, the Decision of the Court of Appeals in this case is 'arbitrary and capricious', in that it is inconsistent with the undisputed facts in the Record, is not supported by any competent, admissible evidence in the Record, and is contrary to the established law of the State of California applicable to out-of-court compromise settlement agreements, and thereby deprives Appellants of property, consisting of valuable Contract Rights and interests in Real Property, contrary to the 'Due Process' of Law guaranteed to Appellants the 14th Amendment to the United States Constitution, and the similar provisions of the California Constitution. [68]

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[68] Lassiter vs. Department of Social Services of Durham County, N.C., 101 S.Ct. 2153, 452 U.S. 18, 68 L.Ed.2d 640, reh.den. 102 S.Ct. 889, 453 U.S. 927, 69 L.Ed.2d 1023 (1981) - 14th Amendment imposes on state the standards necessary to insure that judicial proceedings are fundamentally fair; McCluney vs. Jos. Schlitz Brewing Co., 649 F.2d 578 (CA, MO, 1981), affd. 102 S.Ct. 624, 454 U.S. 1071, 70 L.Ed.2d 607, reh.den. 102 S.Ct. 1295, 455 U.S. 929, 71 L.Ed.2d 473 - when parties expectations are rationally based on a state's laws, it violates due process to breach those expectations by applying unexpected law; Bagby vs. Beal, 439 F.Supp. 1257 (DC, PA, 1977) - due process necessarily implies a reasonalbe opportunity to be heard and a statutory scheme which is intelligible to the persons affected by it; Carey vs. Piphus, 98 S.Ct. 1042, 435 U.S. 247, 55 L.Ed.2d 252 (1978) - procedural due process rules are meant to protect persons not from deprivation, but from mistaken or unjustified deprivation or life, liberty or property; also see: Mendoza vs. Regents of University of California, 78 CA3d 168, 144 CR 117 (1978); In Re Marriage of Fabian, 41 Cal3d 440, 224 CR 333, 715 P2d 253 (1986); In Re Marriage of Buol, 39 Cal3d 751, 218 CR 31, 705 P2d 354 (1985); Estate of Gill, 19 CA3d 496, 96 CR 786

Therefore, the Court should grant Review in order to correct those aspects of the Decision of the Court of Appeal which have resulted in the impairment of Appellant's constitutional rights and property interests and to avoid the further impairment of Appellant's rights and property interests in violation of the 14th Amendment to the United States Constitution and the similar provisions of the Constitution of the State of California.

VI. Review should be Granted in this case because the Decision of the first District Court of Appeal has **arbitrarily and capriciously established rules** relating to the interpretation and enforcement of the 'Memorandum of Settlement' under CCP 664.6 and CCP 877 in this case, which are **different from and less favorable to the Non-Resident Appellant** than the rules traditionally applied by the California Courts to the interpretation and enforcement of Compromise

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(1971); City of Torrence vs. Workers Compl Appeals Bd., 32 Cal3d 371, 185 CR 645, 650 P2d 1162 (1982); In Re Marriage of Guthrie, 191 CA3d 654, 236 CR 583 (1987); In Re Marriage of Doud, 181 CA3d 510, 226 CR 423 (1986); In Re Marriage of Potter, 179 CA3d 73, 224 CR 312 (1986); Interstate Marine Development Co. vs. County of Los Angeles, 155 CA3d 435, 202 CR 377 (1984); Union Oil Co vs. Moesch, 88 CA3d 72, 151 CR 517 (1979); Ventura County Employers' Retirement Assoc. vs. Pope, 87 CA3d 938, 151 CR 695 (1978); Robertson vs. Willis, 77 CA3d 358, 143 CR 523 (1978); Bodle vs. Bodle, 76 CA3d 758, 143 CR 115 (1978); Western Contracting Corp. vs. State Board of Equalization, 39 CA3d 341, 114 CR 227 (1974); Resolute Insurance Co. vs. Municipal Court for Southern Judicial Dist., 11 CA3d 1006, 90 CR 337 (1970); In Re Marriage of Milse, 182 CA3d 203, 227 CR 70 (1986); In Re Marriage of Barnes, 43 Cal3d 1371, 240 CR 855, 743 P2d 915 (1987); People vs. Flores, 178 CA3d 74, 223 CR 465 (1986); Battle vs. Kessler, 149 CA3d 853, 197 CR 170 (1983); People vs. Ramos, 37 Cal3d 136, 207 CR 800, 689 P2d 430 (1984); In Re Watson, 91 CA3d 455, 154 CR 151 (1979); People vs. Ramirez, 25 Cal3d 260, 158 CR 316, 599 P2d 622 (1979); Van Atta vs. Scott, 27 Cal3d 424, 166 CR 149, 163 P2d 210 (1980); In Re Jay. R., 150 CA3d 251, 197 CR 672 (1983); Lackner vs. St. Joseph Convalescent Hospital, Inc., 106 CA3d 542, 165 CR 198 (1980); County of Ventura vs. Tillett, 133 CA3d 105, 183 CR 741 (1982); Jones vs. Palm Springs Unified School Dist., 170 CA3d 518, 216 CR 75 (1985); Samaan vs. Trustees of Cal. State University & Colleges, 150 CA3d 646, 197 CR 856 (1983); Coleman vs. Dept. of Personnel Admin., 52 Cal3d 1102, 278 CR 346, 805 P2d 300 (1991); Vollstedt vs. City of Stockton, 220 CA3d 265, 269 CR 404 (1990); Burrell vs. City of Los Angeles, 209 CA3d 568, 257 CR 427 (1989).

Settlements under CCP 664.6 and CCP 877 between Citizens of the State of California, **in violation of the Privileges and Immunities Clause and the Due Process and Equal Protection Clauses of the 14th Amendment** to the United States Constitution, and similar provisions of the California Constitution.

The Court of Appeal's Decision in this case deprives Appellant (as an Alaska resident and General Partner of an Alaska Limited Partnership) of the 'Privileges and Immunities' and 'Equal Protection' of the Laws guaranteed to Appellants by the Fourteenth Amendment to the United States Constitution, to the extent that the Court of Appeals Decision in this case applies a different rule of law (to the prejudice of Appellant non-residents of the State of California), as compared to similar cases [69] where the normal rule of law (favorable to Appellants position) has been applied by the California Courts. [70]

And, the 'impairment' and 'violation' of Appellant's Constitutional Rights cannot be corrected by merely 'Depublishing' the Court of Appeal's Decision.

CONCLUSION

Therefore, Appellants submit that the Court should accept Review of the Court of Appeals Decision in this case, to address the important Public Policy Issues relating to the 'authority' that the Court of Appeals has bestowed upon an Attorney who merely files "legal pleadings" on behalf of a Client, to enter into compromise

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69 Mesler vs. Bragg Management Co., 39 Cal3d 290, 216 CR 443, 702 P2d 601 (1985); Valdez vs. Smith, 166 CA3d 723, 212 CR 638 (1985); Nicholson vs. Barab, 233 CA3d 1671, 285 CR 441 (1991).

70 Hicklin vs. Orbeck, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978); De La Cruz vs. Tormey, 582 F.2d 45 (9th Cir., 1978), cert. den. 441 U. S. 965, 99 S.Ct. 2416, 60 L.Ed. 1072; See also: Cohan vs. Alvord, 162 CA3d 176, 208 CR 421 (1984); People vs. Baltor, 77 CA3d 227, 143 CR 478 (1978); Card vs. Community Redevelopment Agency, 61 CA3d 570, 131 CR 153 (1976); Duffy vs. State Board of Equalization, 152 CA 3d 1156, 199 CR 886 (1984); Di Donato vs Santini, 232 CA3d 721, 283 CR 751 (1991); Murphy vs. Pierce, 1 CA4th 690, 2 CR2d 18 (1991).

settlement agreements binding upon the undisclosed Clients of the Attorney (and the other parties in the negotiation), without their consent or express authorization.

In addition, Appellants submit that the Court should accept Review of the Court of Appeals Decision in this case to clarify the law, and to inform the public and members of the Bar, as to the applicability of the 'Equal Dignities Rule' and the 'Statute of Frauds' to compromise settlement agreements entered into under CCP 664.6 and CCP 877.

And finally, Appellants submit that the Court should accept Review of the Court of Appeals Decision in this case to prevent the deprivation of Appellants valuable 'contract' and property rights by the arbitrary and capricious Decision of the Court of Appeals in this case, that neither this Court, nor the Court of Appeals, would want to be cited as "good authority", as to the law governing compromise settlement agreements in the State of California.

Respectfully Submitted this 26 day of July, 1993.

By Appellants: WILLIAM H. BRECK,
Individually and as Successor in Interest
and former General Partner of Venture
Fund I (an Alaska Limited Partnership
dissolved by the expiration of its stated term
on December 31, 1991)

A Copy of the Decision of the Court of Appeal filed June 16, 1993 is attached hereto for convenient reference of the Court.

[See Document # 1 at APPENDIX A-1] "

"

First Appellate District, Division Five, No. A059207
S033638

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

VILLAGE ON THE BAY DEVELOPMENT ET AL,
Respondent

v.

VENTURE FUND I ET AL,
Appellant

SUPREME COURT
FILED
SEP - 1 1993
Robert Wanduff Clerk
Deputy

Petition for review DENIED.
The request for an order directing publication of the opinion is DENIED.

/s/ LUCAS

Chief Justice "

(2)

93-924

DEC 30 1993
OFFICE OF THE CLERK

CASE NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES
October Term, 1993

WILLIAM H. BRECK,

Petitioner,

v.

VILLAGE ON THE BAY DEVELOPMENT, et al.

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE
FIRST DISTRICT COURT OF APPEAL OF
THE STATE OF CALIFORNIA

BRIEF OF RESPONDENTS

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December 30, 1993

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PROPERTIES, INC.

BEST AVAILABLE COPY

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Pursuant to Rule 15 of the Rules of the Supreme Court of the United States, respondents VILLAGE ON THE BAY DEVELOPMENT, PACIFICA BAY VILLAGE ASSOCIATES, INC., JP VILLAGE BAY PARTNERS, and JONATHAN GROUP PROPERTIES, INC. (hereinafter collectively "Respondents") submit the following Opposition to Petition For Writ of Certiorari filed by petitioner WILLIAM H. BRECK (hereinafter "Petitioner").

A cursory review of Petitioner's Petition For Writ of Certiorari (hereinafter

"Petition") reveals that this Court lacks jurisdiction to review this matter. Pursuant to 28 U.S.C. Section 1257, and Rule 10.1 of the Rules of Supreme Court of the United States, this Court shall only review a decision of a state court which involves a federal question. Petitioner fails to cite a valid federal question or constitutional issue to invoke this Court's jurisdiction. Indeed, this appeal concerns the continued validity of a deed of trust after settlement of litigation relating to the deed of trust, purely a state law issue.

This Court, without having the benefit of reviewing the numerous motions and appeals in this case, undoubtedly may find the Petition confusing and ambiguous. The essence of Petitioner's appeal to the California Supreme Court, and to this Court, is that the holding of the California Court of Appeal is contrary to California law. The California Supreme Court considered this very same argument and denied Petitioner's Petition For Review. The Petition raises spurious constitutional claims which continue to argue the same issue identified, and rejected, by both the

California Court of Appeal and the California Supreme Court -- i.e., the application of California law concerning the settlement of litigation. In the absence of a federal question, this Court lacks jurisdiction to hear this Petition For Writ of Certiorari.

II. LEGAL ARGUMENT

A. The United States Supreme Court Does Not Have Jurisdiction To Hear This Appeal

This Court's jurisdiction to review a final judgment of a state court is set forth in 12 U.S.C. Section 1257(a):

> Final judgments or decrees rendered by the highest

> court of the state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or any title, right, privilege or immunity especially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

This Court's authority to review a state court judgment by writ of certiorari is purely discretionary. Hammerstein v. Superior Court of California, 341 U.S. 491, 492, 71 S.Ct. 820, 821 (1951). Although Petitioner has failed to

identify the genesis of this Court's jurisdiction over its appeal, and specifically has failed to identify which treaty or statute of the United States is drawn into question, or whether a statute or ruling by the State of California is "repugnant to the Constitution, treaty, or laws of the United States", the fact remains that this appeal does not concern any federal question or constitutional right (see section B, infra).

Indeed, Rule 10 of the Rules of the Supreme Court of the United States sets forth the considerations for granting review of the writ of

certiorari in cases originated from the state courts (1) when the state court has decided a federal question in a way that conflicts with the decision of other state courts or United States Courts of Appeal (Rule 10.1(b)), or (2) when the state court has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way which conflicts with the applicable decisions of this Court (Rule 10.1(c)) (emphasis added). Nothing in the California Court of Appeal's decision: (1) involves a federal question, or

(2) conflicts with any decision of any other court. A federal court has no power to review a state court decision unless a substantial federal question is involved. Reich v. City of Freeport, 388 F.Supp. 953 (N.D. Ill. 1974).

Petitioner's own actions indicate that he manufactured constitutional issues for the sole purpose of continuing his appeal in this Court. Indeed, at the state trial court, at the California Court of Appeal, and in Petitioner's Motion For Rehearing at the California Court of Appeal, Petitioner never raised any federal or constitutional issues.

Petitioner first noted various inapplicable constitutional claims in his Petition for Review at the California Supreme Court. This Court lacks jurisdiction if a federal question or constitutional issue has not been raised and decided by a state court. Illinois v. Gates 462 U.S. 213, 103 S.Ct. 2317 (1983). Petitioner failed to raise these constitutional issues at the California Court of Appeal, the very judgment he seeks to reverse, and therefore this Court lacks jurisdiction to hear this appeal.

B. Petitioner's Appeal Involves Neither A Federal Question Nor A Constitutional Issue

In pages 24 through 28 of the Petition, Petitioner vainly applies various constitutional issues in order to federalize his appeal, but completely fails to articulate how the California court rulings violate any constitutional provision.

For example, in the second full paragraph of page 25, Petitioner cites alleged unfair and unequal treatment arising from the California Court of Appeal's refusal to review de novo the factual determinations

of the trial court, yet his cited authority fails to support this assertion. Indeed, California Code of Civil Procedure section 906 gives the Court of Appeal discretionary, not mandatory, authority to review the facts in the trial court. Petitioner apparently argues, without any legal authority, that the California Court of Appeal's failure to overturn the factual determinations of the trial court violated the United States Constitution.

In the very next paragraph, Petitioner declares that the California Court of Appeal's disregard of "undisputed"

evidence deprived Petitioner of due process, yet his cited authority involves cases in which this Court required some evidence, even circumstantial evidence, before upholding a criminal conviction. Thompson v. City of Louisville, 362 U.S. 199, 80 S.Ct. 624 (1960). In this case, substantial evidence supported the trial court's determination in this civil litigation. Petitioners' cited authority are inapplicable to this case.

Petitioner's next paragraph demonstrates the true absurdity of this Petition. Petitioner declares that the California Court of Appeal's decision,

"made in disregard of the plainly applicable statute law of the state, and disregard of the controlling decision of the highest state court", violated the Petitioner's due process rights. Petitioner made this very same argument to the Supreme Court of the State of California in his Petition For Review, which the California Supreme Court denied. The entire basis of this appeal (i.e., that the California Court of Appeal decision was contrary to California law) would be more persuasive if the California Supreme Court had not rejected this same assertion.

C. Procedurally, The Petition Fails To Satisfy Rule 14

Although the Petitioner is an attorney who has represented himself in pro per, all his prior pleadings, including the present Petition, have sufficiently lacked accuracy, brevity, and clarity, causing opposing counsel and the courts much consternation. Pursuant to Rule 14.5[1] of the Rules of the Supreme Court of the United States, this Court should deny

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[1] "The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition."

the Petition on these same grounds.

III. CONCLUSION

This Court lacks jurisdiction to hear this appeal. The Petition neither raises a federal question nor a constitutional issue which conflicts with the decisions of other state or federal courts. Furthermore, no important question of federal or constitutional law is raised by this appeal, nor was raised at the California Court of Appeal. This appeal solely concerns application of California state law and the California Courts have consistently applied this

law adverse to Petitioner. No basis exists for granting Petitioner's Petition For Writ of Certiorari.

December 30, 1993

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pet1.opp